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In The

Supreme Court of the United States

October Term, 1995

IN RE: HOLYWELL CORPORATION and
THEODORE B. GOULD,

Petitioners.

**Petition For A Writ Of Mandamus
To The United States Court Of Appeals
For The Eleventh Circuit
And To The
United States District Court
For The Southern District Of Florida,
Senior District Judge Sidney M. Aronovitz**

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Whereas lower courts have mistaken and misconstrued the plain meaning of the mandate of this Court, and its opinion, cited as *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021 (1992), should mandamus issue on petition of the prevailing parties to insure that remanded proceedings conform to that opinion?

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For The Southern District Of Florida,
Senior District Judge Sidney M. Aronovitz

PETITION FOR A WRIT OF MANDAMUS

Holywell Corporation,[1] and Theodore B. Gould, by their undersigned counsel, respectfully petition for a writ of mandamus to clarify the meaning of this Court's mandate and opinion, in *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021 (1992).

[1] Petitioner Holywell Corporation has no subsidiaries other than wholly-owned subsidiaries. No other petitioner is a corporation. See S.Ct. R. 29.1.

OPINIONS OF OTHER COURTS

The opinion of the court of appeals, App. 3a, remanding the proceedings to the district court for hearings in conformity with this Court's *Holywell Corp. v. Smith* opinion, is reported at 965 F.2d 994 (11th Cir. 1992). The order of the district court remanding the proceedings to a bankruptcy judge is unreported.

The order of the district court, App. 41a, which affirmed the bankruptcy court's judgment denying that Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Trustee"), had engaged in breach of fiduciary duty and other misconduct, is unreported. The bankruptcy court's findings of fact and conclusions of law, App. 17a, are unreported.

The bankruptcy court's judgment concluding that the Bank was liable for negligent misrepresentation as the proponent of a court-approved plan, App. 4a, is reported at 161 B.R. 302 (Bkrtcy. S.D. Fla. 1993).

JURISDICTION

The mandate of this Court was entered as of February 25, 1992, App. 1a, and its opinion is reported at 503 U.S. 47, 112 S.Ct. 1021 (1992). The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

The pertinent text of the following statutory provisions involved in this petition are set forth in the attached

appendix: (1) 28 U.S.C. § 1334, Bankruptcy cases and proceedings, App. 63a; (2) 28 U.S.C. § 157, Procedures, App. 64a; (3) 11 U.S.C. § 105, Power of court, App. 66a; (4) 11 U.S.C. § 505, Determination of tax liability, App. 67a; (5) 26 U.S.C. § 6901, Transferred assets, App. 68a; (6) 26 U.S.C. § 7421, Prohibition of suits to restrain assessment or collection, App. 69a; (7) 28 U.S.C. § 2201, Creation of remedy, App. 69a; (8) 26 U.S.C. § 1398, Rules relating to individual's title 11 cases, App. 70a; and (9) 26 U.S.C. § 1399, No separate taxable entities for partnerships, corporations, etc., App. 74a.

STATEMENT

1. **The Bankruptcy Cases and the Miami Center Liquidating Trust.** – This petition for a writ of mandamus to the court of appeals and to senior district judge Sidney M. Aronovitz is related to five separate chapter 11 bankruptcy proceedings filed by the petitioners and related parties.

On August 8, 1985, the bankruptcy court confirmed an amended Plan, proposed by the Bank of New York ("Bank") on behalf of the debtors, see *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985). A "modified form of substantive consolidation proposed by the [amended] plan," *Id.* at 43, was reaffirmed which required the payment of Holywell's liabilities prior to any dividend distribution of Holywell's net assets to the Miami Center Liquidating Trust, created postconfirmation, to fund the trustee's payment of allowed unsecured claims filed

against the Miami Center Limited Partnership ("MCLP")'s estate [C.P. NO. 614], *Id.*

The court of appeals vacated the prior order of the district court, which affirmed the bankruptcy court's order confirming the Bank's amended plan, *Holywell Corporation v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), based on the grounds that substantial consummation of the Bank's plan precluded effective relief, and required dismissing as moot the appeal of the confirmation order. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1558 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).[2]

2. **This Court's Holywell Opinion.** – This Court's prior opinion explains the provisions of the Bank's amended plan which created the Miami Center Liquidating Trust ["liquidating trust"] and specifies the duties of the trustee, appointed postconfirmation under the plan's provisions, to administer the liquidating trust, see 112 S.Ct. at 1024 and 1026. This Court held, in relevant part:

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[2] The court of appeals granted deference under the clearly erroneous standard to the bankruptcy court's adoption verbatim of the findings of fact and conclusions of law proposed by the Bank, 838 F.2d at 1551, n.4, and concluded that "[t]he bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified," *Id.* at 1557.

A separate panel of the same court later affirmed the reversal by another district judge of the bankruptcy court's order confirming the Bank's amended plan on the grounds that the plan was not fair and did not comply with the Bankruptcy Code's requirements specified in 11 U.S.C. § 1129, see *In re Holywell Corp.*, 913 F.2d 873, 880 (11th Cir. 1990).

> Whether or not the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation, as the United States contends, we do not believe that a mere substitution occurred in this case. The plan, as quoted above, "declared and established" the new Miami Center Liquidating Trust. It then vested all of the assets of Gould's estate to respondent Smith as trustee. The plan did not simply substitute the trustee for Gould as the fiduciary of the estate. Rather, *it created a separate and distinct trust holding the property of the estate* and gave the trustee control of this property. The Bankruptcy Code expressly permits this arrangement. See 11 U.S.C. § 1123(a)(5)(B) (authorizing a plan to transfer "all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan"). *The trustee, therefore, is not acting as the fiduciary of Gould's bankruptcy estate.* . . . 112 S.Ct. at 1026. (Emphasis added)

This Court concluded that "the Miami Center Liquidating Trust is a 'trust', and that respondent Smith is its 'fiduciary'," and, quoting Treasury Regulation 26 CFR § 301.7701-4(d) (1991), "[t]he Miami Center Liquidating Trust clearly fits this description [of a liquidating trust]." *Id.*

This Court further held that, as the assignee of "all" or "substantially all" of the petitioner Holywell's property, the trustee must file the returns that Holywell would have filed had the Bank's plan not assigned the

petitioner's property to the trustee, *Id.* at 1025,[3] and also concluded that "[n]o tax liability becomes due under § 6151 until the time required for making those returns," *Id.* at 1028. Thus, the opinion held:

> *Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect to postconfirmation claims.* Cf. 11 U.S.C. § 101(10) (1988 ed., Supp. II) (defining "creditor" as used in § 1141(a) as an entity with various kinds of pre-confirmation claims). (Emphasis added) *Id.*

The issue which was carried to this Court on certiorari to the court of appeals was "whether the liquidating trustee breached his duty either under the terms of the Plan or other statutory provisions," *In re Holywell Corp.*, 911 F.2d 1536, 1546 (11th Cir. 1990). The court of appeals held that "neither the provisions of the plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes," *Id.* at 1546.

The trustee had asserted a laches defense based on correspondence placed in evidence during the hearings before the bankruptcy court on February 11, 1988. The correspondence indicated that Holywell, and Deloitte Touche, its court-appointed accountant, would prepare the required corporate income tax returns. The trustee

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[3] Fred Stanton Smith was required to file a corporate income tax return for Holywell Corporation & Subsidiaries on October 15, 1985, as the assignee of Holywell's property for the fiscal tax year ended July 31, 1985. The first fiduciary return of the separate liquidating trust was due on April 15, 1986, for the calendar year ended December 31, 1985.

argued, in the lower courts and in this Court, based on this correspondence, that "the debtors and their accountants represented to the trustee that they would file the returns and pay the taxes," *infra* at 17. The Bank's plan, however, required "the liquidating trustee not only to liquidate the . . . [Trust's] property but also to manage the property in 'all other ways as would be lawful for any person owning the same to deal therewith . . . ,'" Article V, paragraph 3." 911 F.2d at 1547.[4]

3. **These Proceedings.** – The petitioners had filed various lawsuits, alleging that the trustee's failure to establish a reserve for the payment of federal and state

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[4] Mr. Smith testified in the remanded proceedings below, as he had previously testified during the original hearing on February 11, 1988, as follows:

> Q. Was there any provision in the bank's plan that relieved you of the responsibility for filing income tax returns?
>
> A. No.
>
> Q. Was there any provision in the bank's plan that relieved you of the responsibility for the establishment of a reserve to pay federal and state income taxes?
>
> A. No.
>
> Q. Were you specifically required under the provisions of the bank's plan to act in a manner that was lawful . . . [f]or any person who owned the property and who is responsible for dealing with that property?
>
> A. Yes.
>
> Q. Was all or substantially all of the property of Holywell Corporation and its subsidiaries vested in your fiduciary custody on October 10, 1985?
>
> A. Yes.

Bkrtcy. S.D. Fla., Transcript, June 21, 1993, p. 335.

income taxes on behalf of the estates of the separate taxable entities in his fiduciary custody, see App. 25a, constituted negligence and a breach of fiduciary duty. In response, on December 27, 1987, the trustee filed in the bankruptcy court an Adversary Complaint for Declaratory Relief against the United States of America, *et al.*, Adv. No. 87-0627-BKC-SMW.

This Adversary Complaint alleged that "9. [n]o provision was made in either the Plan or the Order [confirming the plan] authorizing the Trust to use the Washington Proceeds for payment of income taxes on any gain realized . . . from the sale of the Washington[5] and Miami Center properties," and admitted that "[n]o payment has been made nor has any reserve been established for the payment of income taxes which may be due on the gain realized from the sale of the Washington and Miami properties."

The trustee sought a declaratory judgment from the bankruptcy court, under the exception for 11 U.S.C. § 505(a) in 28 U.S.C. § 2201, App. 69a, for relief from his statutory duty for the payment of taxes as a fiduciary, p. 7. The answer of your petitioners, filed on January 25, 1988, denied that the bankruptcy court had postconfirmation jurisdiction to grant such declaratory relief to the trustee as a transferee of the property of a taxpayer and

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[5] On December 31, 1984, the bankruptcy court had entered an order [C.P. No. 303], on the Bank's motion, which required the determination and payment of income taxes attributable to the sale of the Washington Properties. The Bank filed its proposed plan on February 27, 1985.

as a fiduciary of a separate trust distinct from a bankruptcy estate, p. 3; see, 112 S.Ct. at 1026.

The petitioners also alleged that "the actions of the Bank of New York constitute a fraud on the court . . . [and] the Trustee's failure to properly reserve for this [tax] obligation is a breach of fiduciary duty," p. 5. Nevertheless, the bankruptcy court granted the relief sought by the trustee, see *In re Holywell Corp.*, 85 B.R. 898 (Bkrtcy. S.D. Fla. 1988).

After this Court's *Holywell* opinion was issued, which reversed the court of appeals' opinion that the trustee had not breached his duty to pay income taxes, *supra* at 6, your petitioners filed various motions in the bankruptcy court on May 28, 1992, seeking to dissolve the liquidating trust [C.P. No. 2332], to dismiss Smith as liquidating trustee [C.P. No. 2331], as well as his attorney [C.P. No. 2329], and Arthur Andersen & Co. as accountant for the trustee [C.P. No. 2330], and to prevent the trustee from using the liquidating trust's funds to pay his attorney's fees.[6]

At the same time, a motion to withdraw the proceedings from the bankruptcy court was filed, which motion was denied by the district court, as follows:

> The debtors' motions seek to dissolve the liquidating trust and dismiss the trustee and the trustee's lawyer and accountant. The motions

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[6] As of July 31, 1995, the trustee has disbursed $8,735,282.17 of the liquidating trust's funds, to pay his own fees, and the fees and expenses of his attorneys, accountant, and consultants, including the costs related to his unsuccessful defense in this Court.

> challenge the conduct of the liquidating trustee in carrying out the reorganization plan in light of the recent Supreme Court ruling in *U.S. v. Smith*. . . . The debtors have failed to show that these proceedings require a "substantial and material" interpretation of non-bankruptcy code law. [Citation omitted] Further, the bankruptcy court retained jurisdiction to resolve any issue affecting the implementation of the reorganization plan." *In re Holywell Corp.*, Case No. 92-1266-Civ-Moore, August 6, 1992, p. 3.

On July 14, 1992, the Internal Revenue Service ("IRS") issued its report to "Fred Stanton Smith acting on behalf of Holywell Corporation & Subsidiaries" ("Holywell Report") asserting tax liabilities of $19,144,938 attributed to asserted capital gains of $71,138,411.94 related to the Miami Center's sale, and penalties of $5,743,481, in accordance with the Secretary's authority under 26 U.S.C. § 6020(b).

The IRS Holywell Report was based on the conclusions that the Bank's plan was a scheme to avoid the payment of taxes, pp. 38-39, and the trustee misappropriated the cash of Holywell and its nondebtor subsidiaries, in an amount of $22,786,770, in order to pay claims against MCLP's estate and the trustee's administrative expenses, p. 37. The IRS imposed penalties for negligence on the trustee under 26 U.S.C. § 6651(a), p. 41. The Report concluded:

> There are no provisions under the Internal Revenue Code for the [substantive] consolidation of an individual with a partnership or an individual with a corporation or a partnership with a corporation. These are separate and distinct

> entities for tax purposes, see section 7701(a) of the Internal Revenue Code.
>
> There is no provision in any section of Chapter 1 of the Code that allows a deduction for amounts used to satisfy the debts of another taxpayer, p. 36, [and] . . . [s]ection 311 of the Code provides that no loss shall be recognized by a corporation on a distribution with respect to its stock, *Id.*

On December 16, 1992, the IRS issued a separate report to "The Bankruptcy Estate of Theodore B. Gould," asserting an income tax liability in the amount of $1,218,732 for the period ended October 10, 1985, the date upon which the property of the individual debtor's estate was transferred to the liquidating trust. The Report concluded:

> [A] transfer of assets took place, on October 10, 1985, between the estate of T. B. Gould and the Miami Center Liquidating Trust. The assets transferred consisted of cash in the amount of $1,905,943, a super-priority loan in the amount of $2,782,502, stock of Holywell Corporation, a 50% general partnership interest in Miami Center Joint Venture, a 5% limited partnership interest and 12.12% general partnership interest in Miami Center Limited Partnership, and a 36% general partnership interest in Chopin Assoc. *This transaction qualifies as a sale or exchange of the individual's estate assets.* The estate must recognize a gain or loss under the provisions of section 1001 of the Internal Revenue Code on this transaction. (Emphasis added) pp. 6-7.

On January 5, 1993, the IRS likewise issued a separate report to "Miami Center Liquidating Trust, Fred Stanton

Smith-Trustee." The Report concluded that the liquidating trust "was a separate taxable entity [and] the Trust is not entitled to a distributable net income deduction under Section 661 of the Code," p. 24.

After the mandate of the court of appeals was entered, on August 7, 1992, App. 3a, 965 F.2d at 994, directing the district court to hold hearings in conformity with this Court's Holywell opinion, the trustee filed a motion to remand the proceedings to the bankruptcy court for implementation of this Court's mandate.

The district court granted the trustee's motion, despite the objection of your petitioners that 11 U.S.C. § 105 sets forth the scope of authority granted to a bankruptcy judge for proceedings related to a bankruptcy case under 28 U.S.C. § 157, and that the bankruptcy court lacked subject matter jurisdiction to hold further proceedings in accordance with this Court's opinion, which had established that no bankruptcy estate was still involved. The petitioners argued that the trustee, who was not a debtor, would be the defendant in any proceedings held in conformity with this Court's *Holywell* opinion.[7]

The petitioners did acknowledge that in a separate proceeding under "the fraudulently begotten judgment" doctrine, *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2132 (1991), quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 323 U.S. 238, 245 (1944), the bankruptcy court had an

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[7] Under Rule 14 of the Federal Rules of Civil Procedure, the trustee, as a defendant, could have impleaded the Bank, and the trustee would have asserted the claims of a third-party plaintiff against the Bank.

inherent power to impose damages on the Bank, as the Plan's proponent, for fraud on the court.[8]

On April 2, 1993, one month after the proceedings were remanded to the bankruptcy judge, the petitioners filed a Rule 60(b)(5) motion for relief from the bankruptcy court's order, which had dismissed a complaint filed against Fred Stanton Smith, individually and as trustee, and against the Bank. The complaint, which was filed in State court, had alleged negligence and breach of fiduciary duty for, *inter alia*, the failure to establish a reserve for the payment of taxes, breach of contract, and conversion. The defendants had removed the complaint from State court under 28 U.S.C. § 1452.[9]

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[8] The prior opinion of the court of appeals had held that the Miami Center mootness doctrine barred "the allegation that the bankruptcy court lacked authority to confirm the [Bank's] Plan and the allegation that the Bank of New York acted fraudulently in obtaining approval of the Plan," 911 F.2d at 1546, on the grounds that "[t]he need for finality require[d] that we decline to address the merits of these allegations which seek to challenge the court-approved Plan," *Id.* at 1543.

[9] Under the common law of Florida, the only defenses against allegations of a trustee's misconduct are laches and estoppel, 33 Fla. Jur. §§ 117; 118. The district court had held that under the doctrines of res judicata and collateral estoppel, the petitioners were barred from relitigating the issue of the trustee's "failure to establish a reserve for the payment of income taxes [because] [t]he Bankruptcy Court held that the Trustee was not responsible for the filing of federal income tax returns on behalf of the Debtors or liable to the United States for the payment of any federal income taxes," *In re Holywell Corp.*, 93 B.R. 780, 784 (S.D. Fla. 1988), *affirmed*, 881 F.2d 1086 (11th Cir.), *cert. denied*, 493 U.S. 1057 (1990).

The bankruptcy court denied the Rule 60(b) motion on April 30, 1993, without explanation. The district court affirmed, without oral argument, and held, in relevant part:

> The Supreme Court decision was limited to the issue of the Trustee's responsibility to file tax returns and pay federal taxes. The Court held that the failure of a plan of reorganization to provide for the taxes did not bind federal tax authorities. This decision does not affect the issues raised in the Complaint. *In re Holywell Corp.*, Case No. 93-0942-Civ-Moore, May 19, 1994, p. 3.

The district court also concluded that "[t]he Supreme Court's tax decision has not changed the result of the debtors' prior unsuccessful attacks on the Trustee," p. 4. The affirmance by the court of appeals, entered on July 19, 1995, is the subject of a related petition for a writ of certiorari.

After the district court's remand, the petitioner Gould filed a motion to enjoin Fred Stanton Smith from disbursing the liquidating trust's funds to pay the corporate income liabilities asserted against a different taxpayer, Holywell Corporation & Subsidiaries, *supra* at 11, in order to relieve himself of personal liability arising from (a) his misappropriation of the cash of Holywell and its *nondebtor* subsidiaries to pay claims against MCLP and the trustee's administrative expenses, *supra* at 10;[10] (b) his

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[10] The Internal Revenue Service concluded that "funds were not disbursed by the trustee in accordance with statutory priority and such funds could possibly be recovered." *Holywell*, July 14, 1992, p. 6, n.23.

failure to collect their assets; and (c) the transfer without consideration of substantial assets of entities other than the debtor's estate to the Bank's nominee as the Miami Center's buyer.[11]

The trustee then filed an amended adversary complaint against the United States, Holywell, *et al.*, in which he requested that the bankruptcy judge determine the amount and priority of the taxes for which he was the person made liable under 11 U.S.C. § 6151(a), App. 11a, in accordance with this Court's opinion. See, 112 S.Ct. at 1024. The trustee also alleged, *inter alia*, that the Bank was liable as the Plan's proponent for negligent misrepresentation (Count I); a contractual claim for indemnification under which the trustee alleged that he "would not have implemented the plan and would not have executed any of the documents necessary for the sale of the Miami Center without receiving the October 10, 1985 letter of indemnity" (Count II); and fraud and intentional misrepresentation under which the trustee alleged that "[t]he bank proposed the plan without . . . provision for federal or state taxes, in direct violation of 11 U.S.C. § 1129(d), in order to ensure payment in full of its mortgage lien, together with over $27,000,000 in postpetition interest, and in order to avoid payment of taxes resulting from the implementation of the plan" (Count IV).[12]

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[11] The Internal Revenue Service found that HTC and HLC [two of Holywell's nondebtor subsidiaries] "did not receive any consideration for the FF&E, neither have they received anything to cure the lease defaults," *Miami Center Liquidating Trust*, January 5, 1993, p. 9.

[12] The bankruptcy court's order confirming the Bank's plan found that the Bank's secured claim against MCLP's estate was

On September 24, 1993, the bankruptcy court held the Bank was liable for negligent misrepresentation as the plan's proponent, *Smith v. Bank of New York*, 161 B.R. 302 (Bkrtcy. S.D. Fla. 1993), App. 4a, and concluded, in relevant part:

> . . . there is no dispute that the bank failed to include any analysis of the tax consequences of the proposed reorganization scheme in its disclosure statement or any provision for payment of taxes in its plan. The law requires an analysis of the tax consequences and provision for payment. [Citations omitted] The failure to do so is an omission of material fact. . . . [T]he bank's representations concerning the feasibility of the plan . . . were materially false. App. 15a. 161 B.R. at 307.

On September 30, 1993, the bankruptcy court nevertheless denied the counterclaims of your petitioners against the trustee, which had alleged gross negligence for his failure to discharge the statutory obligations of a fiduciary at the prescribed time and his failure to establish a reserve for the payment of taxes prior to the commencement of distribution under the provisions of the Bank's plan, App. 18a, breach of fiduciary duty[13] for the failure to act with undivided loyalty to the liquidating

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"undersecured," 54 B.R. at 42, and that the Bank faced a "substantial loss now," *Id.*, at 43. Nevertheless, the trustee's attorney voluntarily dismissed the allegation that the Bank had engaged in fraud and intentional misrepresentation during the trial.

[13] The bankruptcy judge relied on the prior judgment of the district court, reported as *In re Holywell Corp.*, 93 F.2d 780 (S.D. Fla. 1988), which was the subject of the petitioner's Rule 60(b)(5) motion.

trust's beneficiary in reliance on the Bank's indemnification, App. 26a, fraud and conspiracy with the Bank to damage the business and legal rights of the petitioners, App. 27a.

The bankruptcy judge's findings of fact and conclusions of law, which were drafted by the trustee's attorney and adopted verbatim by the judge, relied on the doctrine of *res judicata* and collateral estoppel, App. 28a, and also held, in relevant part:

> The debtors have waived whatever right they may have had to assert their claims against the Trustee for his conduct in handling the tax issues and they are estopped from further pursuing such claims because of the representations they and their accountants made that the debtors would file the tax returns and pay the taxes due, and because of their failure to timely present evidence of the adverse tax consequences of the plan and to seek its modification in order to avoid or minimize the taxes. App. 29a.

The bankruptcy court also relied on the doctrine of derived judicial immunity as an "arm of the court", App. 31a, and concluded that the *petitioners* had engaged in inequitable conduct, App. 34a, which included (a) seeking to surcharge the trustee's personal account for the failure to establish a reserve for the payment of taxes prior to the commencement of distribution under the provisions of the Bank's plan, (b) filing a petition for writ of certiorari to this Court concerning the opinion of the court of appeals that the trustee was not responsible for the payment of taxes, and (c) seeking a reward from the

Internal Revenue Service (which was granted), to reimburse him for accounting expenses related to the analysis and segregation of the trustee's commingled accounting of the transactions of the separate taxable entities originally placed in the trustee's fiduciary custody. A timely notice of appeal was filed.

On January 20, 1995, senior district judge Aronovitz held on appeal of the remanded proceedings that "the Bankruptcy Court's factual findings are subject to a clearly erroneous standard," App. 48a, based on the conclusion of law "that the Bankruptcy Court had subject matter jurisdiction over Debtors' counterclaims and cross-claims pursuant to 11 U.S.C. § 505(a), 28 U.S.C. § 157(b)(2)(A) and § 157(b)(2)(O). [Footnote omitted] Also, subject matter jurisdiction is proper due to the original posture of this case and its subsequent remand from the Supreme Court," App. 58a.

The district court held that the bankruptcy court's findings of fact were not clearly erroneous because (1) the "Trustee's 'conduct reflects a high degree of care and a proper and reasonable response to a highly unusual and difficult problem' ", App. 58a; (2) the "Debtors failed to demonstrate any breach of fiduciary duty [because the] 'Trustee complied with each court order governing the tax issues [and] [u]pon the trust being required to file returns and pay taxes, the Trustee did so,' " App. 58a; and no conspiracy was established between the trustee and the Bank, App. 59a, to impose the tax liabilities on the reorganized debtor, which the trustee had a fiduciary duty to pay, see 85 B.R. at 902; also 911 F.2d at 1545.

The district court also held, in relevant part:

> [A] *de novo* review of the Court's legal conclusions shows no error with regard to the September 30, 1993 Final Judgment. Said Final Judgment is in conformity with the Supreme Court's decision in *Holywell Corp. v. Smith, supra.* That decision held that the Trustee had to file returns and pay taxes on income attributable to Debtors' property. The Supreme Court never stated that the Trustee was 'personally liable' for the tax. Rather, it said that the Trustee had to pay taxes which means the Trustee, in his capacity as Trustee. On remand, a settlement was reached between the Trustee and United States to pay those taxes out of the Trust. This is consistent with the confirmed plan which provided that 'all costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected incidental or related thereto, shall be a charge against the Trust Property. The tax settlement was confirmed by the Bankruptcy Court. The matters which have transpired after remand are consistent with and conform to the Supreme Court's *Holywell* decision. App. 60a.

District judge Aronovitz has not yet entered a final judgment concerning the damages caused by the Bank's negligent misrepresentation as the plan's proponent in the appeal of the petitioners concerning the bankruptcy court's order approving the joint motion of the Bank and trustee limiting such damages to $15,000,000, subject to the condition that "the Bank shall have no duty to make any payments to the Trustee under the Judgment."

REASONS FOR GRANTING THE WRIT

1. The Threshold Jurisdictional Question

The first question is whether the necessary meaning of the mandate of this Court's *Holywell* opinion *precluded* the district court from referring the remanded cause to a bankruptcy judge to determine the amount of taxes in accordance with 11 U.S.C. § 505(a), App. 67a, for which the trustee (not a bankruptcy trustee) was liable as a fiduciary for separate taxable entities, see 112 S.Ct. at 1024, and to treat various state common law causes of action against a nondebtor, alleging gross negligence, breach of fiduciary duty, fraud, and conspiracy, as core proceedings under 28 U.S.C. § 157(b)(2)(A) and § 157(b)(2)(O), App. 65a.

In *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943), this Court held that "[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." The general rules applicable to the issuance of mandamus in the present case have been stated in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895), as follows:

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than

> execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald v. United States,* 12 Pet. 488, 492; *Texas & Pacific Railway v. Anderson,* 149 U.S. 237. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins v. Fourniquet,* 14 How. 313, 330; *In re Washington & Georgetown Railroad,* 140 U.S. 91; *City Bank v. Hunter,* 152 U.S. 512; *City Bank, petitioner,* 153 U.S. 246. [I]t is for this court to construe its own mandate, and to act accordingly. *Sibbald v. United States,* 12 Pet. 488, 493; *West v. Brashear,* 14 Pet. 51; *Supervisors v. Kennicott,* 94 U.S. 498; *Gaines v. Rugg,* 148 U.S. 228, 238, 244.

This rule for the issuance of mandamus was quoted in a *per curiam* opinion on a motion for clarification of mandate in *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427 (1978).

(a) In twenty-three years teaching taxation at the University of Virginia, seven years as the chief editor of Alexander's Federal Tax Handbook, and almost fifty years practicing bankruptcy and tax law, counsel for the petitioners is not aware of a single sustained precedent in the history of Anglo-American jurisprudence on which the respondent and lower courts could rely to authorize the reference to a bankruptcy judge of the determination of the amount and collection of taxes, in a case which is

not related to a claim against a debtor's bankruptcy estate.

It is a fundamental principle that the bankruptcy laws do not supersede the laws for the collection of taxes, see *United States v. Herron*, 87 U.S. 251, 261 (1873), and 11 U.S.C. § 505(a) does not supersede the Anti-Injunction Act (dealing with tax collection), App. 69a, which provides, with certain stated exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," App. 69a. The plain meaning of section 505(a) of the Bankruptcy Code, App. 67a, grants a bankruptcy court power to rule only on the amount of the tax obligations of a *debtor.*

Congress did not grant authority to the courts to determine the amount of the liability of the transferee of the property of a taxpayer, see 26 U.S.C. § 6901(a)(1), or of a fiduciary under 31 U.S.C. § 3713(b), see 26 U.S.C. § 6901(a)(1)(B), App. 68a. Furthermore, the Anti-Injunction Act, App. 69a, divests bankruptcy courts of jurisdiction over the tax obligations of nondebtors. This Court has held that the trustee is not the fiduciary of a Chapter 11 estate, 112 S.Ct. at 1026, and the claims of the United States against the trustee for the taxes attributable to the income from the transfer of the taxpayer's property are not preconfirmation claims against a bankruptcy estate, *Id.* at 1028. The Eleventh Circuit has itself held that a bankruptcy court has no jurisdiction over the tax liability of taxpayers who are not debtors. *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1549 (1986).

The IRS has concluded that the transfer of the individual debtor's estate to the separate and distinct trust must be treated as a sale at fair market value, *supra* at 11, and in *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), this Court held that deference must be granted to the IRS Commissioner's interpretation of the tax statutes, rules and regulations.

This case is unique, because in its original posture the trustee sought a declaratory judgment from a *bankruptcy* court concerning his fiduciary duties with respect to the tax liabilities attributable to the sale of the property of the separate taxable entities originally placed in his custody; however, Congress has forbidden suits seeking declaratory relief regarding tax liabilities (28 U.S.C. § 2201), App. 69a, and has granted taxpayers only two methods for review of the assessment and collection of taxes: (1) A taxpayer may file a petition for review of an assessment in Tax Court; or (2) A taxpayer may pay the tax and seek a refund in a federal district court in accordance with 28 U.S.C. § 1346(a)(1) or in the Court of Federal Claims under 28 U.S.C. § 1491(a)(1).

If the person challenging the payment of the taxes, or the collection actions of the Internal Revenue Service, is not the taxpayer, the Anti-Injunction Act is not applicable and his remedy is limited to the procedures outlined in 26 U.S.C. § 7426 (wrongful levy actions).

(b) In this case, the problem is that, after this Court reversed the opinion of the court of appeals, the causes were "remanded to the United States Court of Appeals for the Eleventh Circuit for further proceedings in conformity with the opinion of this Court," App. 1a. The only

controversies which the district court had jurisdiction to hear and resolve, however, in the remand from the court of appeals, concerned the damages caused by the trustee's failure to discharge his fiduciary duty under the court-approved plan to liquidate the property which had been transferred to the trust and which the plan required the trustee to deal with "in all other ways as would be lawful for any person owning the same to deal therewith," Article V, *Creation of Trust, supra* at 7.

2. The Trustee's Breach of Fiduciary Duty Could Not Be Reexamined.

The second question is whether the trustee's breach of fiduciary duty was open to be reheard in the lower courts. This Court's opinion reversed the Eleventh Circuit's judgment that the trustee did not breach his duty under statutory provisions, 112 S.Ct. at 1024; compare 911 F.2d 1546.

The fundamental rule is that "it is settled in this court, that whatever has been decided here upon appeal cannot be reexamined in a subsequent appeal of the same suit," *Supervisors v. Kennicott*, 94 U.S. 498 (1877). Similarly, in *Ex Parte Sibbald v. United States*, 12 Pet. 488, 492 (1838), this Court held, in relevant part:

> When the Supreme Court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. 24 Sect. Judiciary Act, 1 Story's Laws, 61. Whatever was before the Court, and is disposed of, is considered as finally settled. The

> inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. . . .

In the present case, the district court lacked the discretion to refer proceedings concerning the trustee's breach of fiduciary duty to a bankruptcy judge as a core proceeding under 28 U.S.C. § 157(b) and to rely on the trustee's laches defense, *res judicata* or collateral estoppel, contributory negligence, inequitable conduct, and the doctrine of derived judicial immunity "to depart in any respect from the judgment of this court," *Gaines v. Rugg*, 148 U.S. 229, 243 (1893). Furthermore, causes of action against this trustee, alleging fraud, conspiracy, gross negligence, misconduct, and breach of fiduciary duty, are not proceedings concerning "[t]he restructuring of debtor-creditor relations [that] . . . is at the core of the federal bankruptcy power [and which] must be distinguished from adjudication of state-created private rights," *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2871 (1982).

The present case does *not* concern the conduct of a trustee in a case under title 11, appointed under the provisions of Chapter 11, namely section 1104, to liquidate the property of a debtor's estate during the administration of the case. It concerns the failure of a person appointed as an officer of the court to act as the fiduciary of a trust on behalf of another person, see 112 S.Ct. at 1026, quoting Treasury Regulation 26 CFR § 301.7701-6, to

conduct himself with undivided loyalty to the trust's beneficiary, see *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049, 1055, n.12 (1942), quoting *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928).

The counter-claims against the trustee are not against a creditor who filed a claim in bankruptcy, nor did the cross-claims against the Bank arise out of the Bank's claims against the debtor MCLP's estate, compare *Commodities Futures Trading Commission v. Schor*, 106 S.Ct. 3245, 3258 (1986), citing *Katchen v. Landy*, 382 U.S. 323, 86 S.Ct. 467, 475 (1966). These causes of action are at most "related to cases under title 11," and, as the concurring opinion in *Northern Pipeline* stated, in relevant part:

> There is apparently no federal rule of decision provided for any of the issues in the lawsuit. No method of adjudication is hinted, other than the traditional common law mode of judge and jury. The law suit is before the Bankruptcy Court only because the plaintiff ha[d] previously filed a petition for reorganization in that court. 102 S.Ct. at 2881.

The trustee sought the Bank's indemnification to hold himself personally harmless for his actions under the provisions of the Bank's plan, instead of seeking the court's instructions, with notice to interested parties, prior to the commencement of distribution under the plan's provisions. It is, however, a rule of the law of trusts, as this Court held in *Buffum v. Peter Barceloux Co.*, 53 S.Ct. 539, 542 (1932) that "[a] trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value [and] . . . [n]othing he can

do afterwards . . . will affect that liability, except at the option of the beneficiary complaining of the wrong."

Under 28 U.S.C. § 1334, App. 63a, original jurisdiction over the exercise of the bankruptcy powers is conferred on district courts, providing them with exclusive original jurisdiction in all cases under title 11, and nonexclusive original jurisdiction for proceedings (1) arising under title 11, (2) arising in cases under title 11, and (3) controversies related to cases under title 11. The distinction between cases under title 11 or arising under title 11 and controversies "related to cases under title 11" is determinative of a bankruptcy judge's authority to adjudicate a proceeding and of a bankruptcy court's authority to enter a final enforceable order.

Under § 157(c)(1), a bankruptcy judge may hear "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." In a "related to" proceeding

> the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected. App. 65a.

Subsection (c)(2) provides in part that "the district court, with consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 . . . to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under Section 158," App. 66a. The petitioners did

not consent to the district court's referral of the proceedings to the bankruptcy judge.

3. The Liquidating Trust is a Separate Taxable Entity

The third question concerns the failure of the lower courts to treat the liquidating trust as a new separate taxable entity in conformity with this Court's opinion, 112 S.Ct. at 1026. The lower courts sanctioned the trustee's use of the liquidating trust funds to pay tax liabilities asserted against Holywell Corporation & Subsidiaries, *supra* at 10 for which the trustee's misappropriation of Holywell's cash to pay claims against MCLP's estate had caused him to be personally liable, 31 U.S.C. § 3713(b), as a collateral consequence of this Court's conclusion that the trustee was an "assignee" of the property of a corporate debtor, 112 S.Ct. at 1025; also, *Beaston v. Farmers' Bank*, 37 U.S. (12 Pet.) 102, 133-34 (1838); *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 488 (1926); *King v. United States*, 379 U.S. 329, 336-38 (1964). Nevertheless, the United States agreed to waive the penalties which the IRS asserted against the trustee, *supra* at 10, upon his payment of the liquidating trust's funds to pay the tax liabilities asserted against Holywell Corporation & Subsidiaries; *see Bull v. United States*, 295 U.S. 247, 261 (1935) ["[t]he United States . . . cannot, as against the claim of an innocent party, hold his money. . . . [T]he unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights."].

Under 26 U.S.C. § 1398 (f), App. 70a, the transfer of property to the estate created under 11 U.S.C. § 541(a) is

not treated as a disposition for the purpose of imposing tax consequences to such transfer. The estate succeeds to the debtor's tax attributes upon the commencement of the case, App. 71a, § 1398 (g). The tax attributes consist, *inter alia*, of (1) net operating loss carryovers, . . . (3) recovery of tax benefit items, (4) credit carryovers, (5) capital loss carryovers, and (6) the debtor's basis, holding period, and the character of the assets. Under subsection (h) any administrative expense allowable under 11 U.S.C. § 503 is a tax deductible expense and excess administrative costs are deductible as an administrative expense carryback for three preceding taxable years and as a carryover to each of seven succeeding taxable years.

Section 1398 does not apply to the interests in a partnership of a debtor who is an individual, App. 70a, and no separate taxable entity is created for a partnership or a corporation upon the commencement of a case under title 11, see 26 U.S.C. § 1399, App. 74a.

Upon the termination of the estate, the debtor succeeds to and takes into account net operating loss carryovers, credit carryovers, capital loss carryovers, and the debtor's basis, without the transfer being treated as a disposition for tax purposes, § 1398(i), App. 73a.

In the present case, this Court has held that a liquidating trust may be created under the provisions of a plan in accordance with 11 U.S.C. § 1129(a)(5)(B), 112 S.Ct. at 1026; however, there is no legislative history establishing the proper treatment for tax purposes of a situation where all the assets of an individual debtor's estate are transferred to a trustee as the fiduciary of such

a separate liquidating trust, and the individual debtor's estate is terminated.

Under 26 U.S.C. § 661, the deductible expenses of a trust distributing corpus shall not exceed the distributable net income of the estate for any taxable year. Section 1398 is not applicable, since it is expressly limited to cases under chapter 11 in which the debtor is an individual.

In the present case, substantial losses have been incurred, and the liquidating trust was required to distribute the current income earned in any taxable year to the trust's beneficiary. See Rev. Proc. 82-58, 1982-2 CB 847, par. 4.07. The amount of the damages caused by the Bank's negligent misrepresentation and creation of the liquidating trust to which the individual debtor's estate was transferred as a taxable event has not been determined in a final judgment entered by the district court and depends on the meaning of this Court's mandate.

CONCLUSION

This petition for a writ of mandamus should be granted.

Respectfully submitted,

HOLYWELL CORPORATION AND
THEODORE B. GOULD

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(804) 977-4500

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 90-1361 and 90-1484

Holywell Corporation, et al.,

Petitioners,

v.

Fred Stanton Smith, etc., et al.; and United States,

Petitioner,

v.

Fred Stanton Smith, etc., et al.

ON WRITS OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THESE CAUSES came on to be heard on the transcript of the record from the above court and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in these causes is reversed with costs, and that these causes are remanded to the United States Court of Appeals for the Eleventh Circuit for further proceedings in conformity with the opinion of this Court.

IT IS FURTHER ORDERED that the Petitioners, Holywell Corporation, et al., recover from Fred Stanton Smith, etc., et al. Three Hundred Dollars ($300.00) for their costs herein expended and that petitioner, United States, recover from Fred Stanton Smith, etc., et al. Five Thousand Eight Hundred Dollars ($5,800.00) for its costs herein expended.

February 25, 1992

Printing of record:	$5,800.00
Clerk's costs:	300.00
Total:	$6,100.00

APPENDIX B

In re HOLYWELL CORPORATION,

Debtor.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, Plaintiff Appellee,

v.

UNITED STATES of America, Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Theodore D.[sic] Gould, Defendants-Appellants,

. . .

United States Court of Appeals, Eleventh Circuit.

July 8, 1992

. . .

REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before HATCHETT and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

These cases are remanded to the district court for further proceedings in conformity with the United States Supreme Court's opinion. *Holywell Corporation et al. v. Smith, et al.*, 503 U.S. ___, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992).

REMANDED.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE BANK OF NEW YORK, UNITED STATES OF AMERICA, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, THEODORE B. GOULD, and MIAMI CENTER CORPORATION,

Defendants.

_____/

Case Nos. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adversary No. 87-0627-BKC-SMW-A

. . .

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO TRUSTEE'S CLAIMS AGAINST THE BANK OF NEW YORK

SIDNEY M. WEAVER, Chief Judge.

This cause came before the court on June 21-22, 1993 for trial on Counts I and II of the Trustee's Amended Adversary Complaint against The Bank of New York. The Trustee seeks recovery both for negligent misrepresentations made by the bank and for enforcement of the indemnity agreement in favor of the Trustee. The court having heard and considered the testimony of witnesses and having reviewed the evidence admitted, having heard argument of counsel, and being otherwise fully advised in the premises, does hereby make the following findings of fact and conclusions of law.

FACTS

The Bank of New York ("bank") was the construction lender on the Miami Center project, which consisted of a hotel, office building, parking garage and shopping podium in downtown Miami. In July 1984, the bank initiated foreclosure proceedings in Dade County, Florida against the developers. One month later, the developers – Theodore B. Gould and four companies he owned, controlled and dominated[1] – filed simultaneous voluntary Chapter 11 petitions in this court.

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[1] Holywell Corporation, Miami Center Corporation, Chopin Associates, and Miami Center Limited Partnership.

Shortly thereafter, the debtors sought the court's permission to consummate the sale to a third party of what is commonly referred to as the Washington properties. The court granted the request and closing occurred in late December 1984 and early January 1985. By order dated December 11, 1984, the court directed the debtors to deposit the proceeds into a segregated account subject to further court order. C.P. 257. These proceeds were deposited without establishing a reserve for payment of income taxes.[2]

The bank filed an emergency motion to treat the *net* proceeds from the sale of the Washington properties as cash collateral which secured, in part, the loan on the Miami Center project, and to both segregate and account for this cash collateral. The court granted this motion by order dated December 31, 1984.

Both the bank and the debtors-in-possession thereafter filed competing disclosure statements and reorganization plans. The primary features of the bank's plan were:

* the creation of the Miami Center Liquidating Trust, consisting of all of the debtors' assets as defined by Bankruptcy Code § 5412(a).

* the appointment of a trustee to administer the trust upon confirmation

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[2] The debtors' accountant, Touche Ross & Co., prepared a report shortly thereafter showing the distribution of the sale proceeds to the selling entities subject to federal income tax liabilities, if any.

* substantive consolidation of the debtors' assets and liabilities[3]

* the sale of the Miami Center to the bank or its nominee for $255.6 million, a price supported by an MAI appraisal.

The assets of the Trust also included, *inter alia*, the gross proceeds from the sale of the Washington properties (even though the order on the bank's cash collateral lien extended only to the net proceeds), and the debtors' stock and partnership interests in one another and in numerous wholly-owned and affiliated non-debtor entities.

The bank's disclosure statement and plan and its amended disclosure statement and amended plan failed to include any analysis of the state and federal tax consequences of consummation of the plan. The bank also failed to address these consequences at confirmation or in the detailed order of confirmation entered after remand.

The debtors' plan did contain a reference to federal taxes. It also called for the sale of the Miami Center and the use of the proceeds from the sale of the Washington properties to pay creditors.

At a hearing before this court on the bank's motion for substantive consolidation, the debtors objected on the ground that adverse tax consequences would result from the entry of such an order. The court invited the debtors

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[3] This feature was ultimately modified prior to confirmation in response to ojbections [sic] filed by debtor Holywell's creditors' committee. As modified, these creditors were to be paid first from Holywell's assets before those assets were used to pay the creditors of the remaining debtors.

to present evidence in support of their objection, and expressed a willingness to permit modification of the bank's proposed plan in order to avoid unnecessary taxes.[4] Nonetheless, neither the debtors nor the bank presented any evidence of the tax consequences of the bank's plan, and neither party sought modification of the bank's plan in order to reduce any such tax obligations.

The creditors overwhelmingly voted in favor of the bank's plan and on August 9, 1985, the court confirmed the bank's plan. Fred Stanton Smith was appointed Trustee of the Miami Center Liquidating Trust several days later and, prior to the effective date, began limited preparation for the sale of the Miami Center.

At the closing on the sale of the Miami Center, the Trustee demanded and the bank provided an agreement by which the bank undertook to indemnify the Trustee "for any claims against said Liquidating Trustee, as a result of execution of the Contract [of Sale of the Miami

---

[4] Bankruptcy Judge Thomas C. Britton states, (C.P. 534):

> The last point I want to touch on are [sic] the tax consequences. In this area, I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision. If a modification of this plan or any other adjustment can be made to alleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored, and I would so as long as I have the discretion to do so intend to accomplish that result.
>
> I think that all of us have recognized in our discussion that there might be tax consequences. We are not certain if we have considered all that we could do to alleviate the adverse tax consequences.

Center] in the manner set forth in the above-quoted provisions or any other provision of the plan."

The working of the indemnity agreement itself and the more credible testimony presented at trial as to the parties' intentions make clear that the bank agreed to indemnify the Trustee for any liability incurred as a result of implementation of the plan, including tax obligations imposed by law upon the Trustee.

The plan became effective and the sale of the Miami Center closed on October 10, 1985.[5] The Trustee thereupon promptly commenced administration of the Trust and, as required by the plan, paid most unsecured creditors almost immediately after the effective date even though there was no provision for taxes. The plan required the Trustee to pay virtually all creditors even before the tax return for Holywell Corp. and Subsidiaries would be due.

The debtors' appeal of the plan was unsuccessful. The district court affirmed the order of confirmation after remand, and the court of appeals ordered the appeal dismissed as moot because the plan had been substantially consummated. *See Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Ltd. Ptnshp. v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

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[5] The debtors appealed the confirmation order but had not posted a bond to stay implementation of the plan during the appeal.

From the time of the August 1985 order of confirmation until mid-1987, the debtors and their accountants repeatedly advised the Trustee that the debtors would file all of the required tax returns and would be responsible for payment of the taxes.

At trial the bank presented no evidence that it conducted any investigation, either before or after confirmation, concerning the tax consequences of its reorganization scheme. The testimony of both the bank officer responsible for the loan and of the bank attorney involved in drafting the plan and in handling the closing was that the bank simply never considered the tax consequences and therefore did not provide for the payment of taxes in the plan. After the debtors demanded the Trustee pay the taxes incurred as a result of the sale, and after the Internal Revenue Service made demand for the filing of tax returns, the Trustee filed an adversary complaint in this court on December 27, 1987 seeking a declaratory judgment on the question of the liability of the Trust to file returns and pay taxes and, if taxes were found to be a Trust responsibility, for recovery against the bank for all of such sums.

This court, the district court and the court of appeals all ruled the Trustee was not responsible for the tax consequences of the plan and, therefore, never reached the question of the bank's liability.[6] The United States Supreme Court reversed, however, and held the Trust was liable for the payment of taxes in accordance with 26

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[6] *See Smith v. United States*, 85 B.R. 898 (Bankr. S.D. Fla. 1988), *aff'd*, No. 88-0795 slip op. (S.D. Fla. July 30, 1989), *aff'd*, 911 F.2d 1539 (11th Cir. 1990).

U.S.C. § 6012(b)(3), (4) even though the plan of reorganization did not require him to pay taxes. *See Holywell Corp. v. Smith*, ___ U.S. ___, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992).

On remand from the Supreme Court, the Trustee filed an amended adversary complaint seeking a determination of the amount and priority of the taxes due the Internal Revenue Service and recovery against the bank for both negligent misrepresentation and enforcement of the indemnity agreement.[7] Debtors Gould and Holywell filed cross-claims against the bank for intentional misrepresentation and fraud, negligent misrepresentation, and conspiracy to injure another in a trade, practice or profession, and counterclaims against the Trustee for gross negligence, breach of fiduciary duty, and conspiracy to injure another in a trade, practice or profession.

Prior to trial the court bifurcated the issues of liability and damages and tried the case on liability only. Accordingly, these findings and conclusions are limited solely to the Trustee's claims of liability against the bank. A separate determination of damages as to the liability of the bank to the Trustee will be made at a later date, and a separate judgment will be entered on the debtors' cross-claims against the bank and counterclaims against the Trustee.

The court notes that it has approved settlements of tax claims asserted against the Miami Center Liquidating

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[7] At trial, the Trustee voluntarily dismissed additional claims brought against the bank for fraudulent misrepresentation, equitable indemnification and breach of contract.

Trust by the Commonwealth of Virginia and the State of Florida, for $2 million and $500,000, respectively, and that the Trustee and the United States have reached a settlement of the amount of taxes owed the federal government, approval of which is set for hearing on September 21, 1993. The Trust has sufficient funds on hand to pay all of these taxes. It appears the Trust does not have sufficient assets, however, to pay all of the claims asserted against it in addition to the taxes.

JURISDICTION

This court has jurisdiction over the bank and the Trustee's claims against the bank, pursuant to Article XIV of the plan and reorganization, 28 U.S.C. §§ 157 and 1334(a), and Rule of Bankruptcy Procedure § 7001(1).

CONCLUSIONS OF LAW

Upon the foregoing, the court finds the bank is liable to the Trustee for the taxes incurred as a result of the plan of reorganization under the indemnity agreement dated October 10, 1985, and by reason of having made negligent representations in the amended plan and disclosure statement with respect to the tax consequences of the plan.

A. *Indemnity Agreement*

[1] The court finds the October 10, 1985 indemnity agreement is neither vague nor uncertain. Although the court permitted testimony at trial as to the intention of the parties in entering into that agreement, nevertheless, the court finds the agreement requires no parol evidence

to interpret what is plainly stated and intended:[8] the bank agreed to indemnify the Trustee "for any claims against said Liquidating Trustee, as a result of execution of the Contract [of Sale of the Miami Center] in the manner set forth in the above-quoted provisions *or* any other provision of the Plan" (emphasis supplied). A plain reading of this unambiguous working leads inevitably to the conclusion that the bank agreed to indemnify the Trustee for any consequence of his implementation of the plan of reorganization, including, but not limited to, the tax consequences.

[2, 3] When contractual language is clear and unambiguous, as it is in this case, the court may not indulge in a construction or interpretation of the plain meaning of the agreement. *See Rey v. Guy Gannett Pub. Co.*, 766 F.Supp. 1142 (S.D. Fla. 1991). Thus, if a contract is clear, the actual language used in the agreement is the best evidence of the parties' intent, and the terms of the contract should be given their plain meaning. *Id.; see also International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service*, 400 F.2d 465 (5th Cir. 1968).

[4] To the extent there is an ambiguity in the wording of an agreement, it ordinarily must be construed against the party who prepared the agreement. *See McGregor v. Board of Com'rs of Palm Beach County*, 956 F.2d 1017 (11th Cir. 1992). In the case *sub judice*, the bank drafted the indemnity agreement specifically to protect

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[8] The evidence of the parties' intent entirely supports the Trustee's contention that the indemnity agreement was designed to indemnify him against anything that might result from consummation of the bank's plan.

the Trustee and to induce him to proceed with the closing. The bank's contention that it never intended to indemnify the Trustee for anything except ordinary warranties of title and like matters arising under the contract for the sale of the Miami Center is not supported by the evidence or the language of the contract. The bank agreed to indemnify the Trustee against *all* claims arising from the sale of the Miami Center and the plan of reorganization. This would obviously include taxes arising as a result of the sale.

For these reasons, the court holds the bank is liable for negligent misrepresentation under the law of Florida,[9] the Trustee must have established at trial a misrepresentation or an omission of material fact; knowledge by the bank as to the falsity of the representation or omission, or proof that the representation or omission was made under circumstances in which the bank ought to have known of its falsity; and proof that the Trustee acted in justifiable reliance on the representation or omission. *See C & J Sapp Publishing Co. v. Tandy Corp.*, 585 So.2d 290, 291 (Fla.Ct.App. 1990); and *Burton v. Linotype Co.*, 556 So.2d 1126, 1128 (Fla.Ct.App. 1989). The Trustee proved each of these elements. As announced at trial, the amount of damage will be determined at a later date.

[6] In this case, there is no dispute that the bank failed to include any analysis of the tax consequences of the proposed reorganization scheme in its disclosure statement or any provision for payment of taxes in its

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[9] The Trustee seeks relief for common law negligent misrepresentation under state law.

plan. The law requires an analysis of the tax consequences and provision for payment. *See* 11 U.S.C. § 1129(d). *See also Hall v. Vance*, 887 F.2d 1041, 1043 (10th Cir. 1989); *In re Cardinal Congregate I*, 121 B.R. 760, 765 (Bankr. S.D. Ohio 1990); *In re Jeppson*, 66 B.R. 269, 292 (Bankr. D. Utah 1986); *In re Malek*, 35 B.R. 443, 444 (Bankr. E.D. Mich. 1983). The failure to do so is an omission of material fact.

The bank presented no evidence that it investigated the tax consequences of its reorganization plan. Both the bank officer and the attorney responsible for this admitted no provision was made for these consequences because the bank never even considered them. As such, the bank's representations concerning the feasibility of the plan and the Trustee's obligations under the plan were materially false. The court and the creditors acted in total ignorance of such obligations because no tax analysis was included and no provision for payment of taxes was made.

It is clear, of course, that the bank intended the Trustee to rely upon the plan in order to carry out its terms. The court finds the Trustee did rely on the terms of the plan in administering his duties. The court also finds the Trustee's reliance on the disclosure statement and plan was fully justified; 11 U.S.C. § 1142, and that he acted reasonably in carrying out the plan terms.

The court, therefore, concludes that the bank's failure to investigate the tax consequences and the failure to include provision for payment of taxes in the plan constituted negligent misrepresentation for which the bank is responsible to the Trustee.

The court finds and determines The Bank of New York is liable to the Trustee on his claims of negligent misrepresentation and under the terms of the October 10, 1985 indemnity agreement. This order is not intended as a final order. By separate order, the court will set this case for trial on the question of the amount of the Trustee's damages.

DONE AND ORDERED.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

Case Nos. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adversary No. 87-0627-BKC-SMW-A

THE BANK OF NEW YORK, UNITED STATES OF AMERICA, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, THEODORE B. GOULD, and MIAMI CENTER CORPORATION,

Defendants.

_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DEBTORS' COUNTERCLAIMS AGAINST THE TRUSTEE AND CROSS-CLAIMS AGAINST THE BANK OF NEW YORK

This cause came before the court on June 21-22, 1993, on debtors Theodore B. Gould and Holywell Corp.'s counterclaims against Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust ("Trustee"), and cross-claims against The Bank of New York, and the court having heard and considered the testimony and argument of counsel, having reviewed and considered the evidence and the pleadings, and being otherwise fully advised in the premises, the court makes the following findings of fact and conclusions of law.

FACTS

The debtors[1] filed simultaneous voluntary Chapter 11 petitions on August 22, 1984. On August 8, 1985, the court confirmed a plan of reorganization proposed by The Bank of New York ("bank"). *See Bank of New York v. Holywell*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Ltd. Ptnshp. v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

The plan's primary features included:

* substantive consolidation of the debtors' assets

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[1] The debtors are Theodore B. Gould and four companies he owns, controls and dominates: Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, and Chopin Associates. Only debtors Gould and Holywell filed the counter- and cross-claims at issue.

* the creation of the Miami Center Liquidating Trust, containing all of the debtors' § 541(a) assets, and the appointment of a trustee to administer the Trust

* the sale of the Miami Center by the Trust to the bank for $255.6 million

* subordination of the debtors' claims

The debtors' assets included but were not limited to the Miami Center property, the proceeds from the pre-confirmation sale of what is commonly referred to as the Washington properties, and various stock and partnership interests.

The bank failed to include a tax analysis or disclose the plan's tax consequences in its disclosure statements, and the plan itself makes no mention of or provision for payment of taxes. *See* 11 U.S.C. § 1129(d). Nonetheless, neither the federal nor state tax authorities objected to the plan, and the debtors' objections and appeal from the confirmation order were unsuccessful. *See Holywell v. Bank of New York, supra.* In 1985, prior to Mr. Smith's appointment as Trustee, this court invited the debtors to present evidence of the claimed adverse tax consequences, and offered to consider modification of the plan upon the presentation of such proof. C.P. 534. The debtors ignored this offer, and never presented any evidence of the tax obligations or sought modification of the plan proposed by the bank.

Mr. Smith was appointed Trustee of the Miami Center Liquidating Trust on August 12, 1985. C.P. 916. Until then, he was not a party to the bankruptcy proceedings. He

played no role in the formulation or confirmation of the plan.

On October 10, 1985, the effective date of the plan, the Trustee conveyed the Miami Center to the bank for $255.6 million in accordance with the terms and conditions of the plan. The bank's nominee paid the purchase price by crediting the amount of the mortgage obligation against the purchase price, including post-confirmation interest[2] and by taking other closing credits and prorations and by paying the balance in cash.

The Trustee did not establish a reserve for taxes due on the pre-confirmation sale of the Washington properties or the post-confirmation sale of the Miami Center. The plan simply did not provide for income taxes.

At the closing, the Trustee demanded from the bank an indemnity agreement. The bank prepared an agreement dated October 10, 1985, in which it undertook to indemnify the Trustee "for any claims against said Liquidating Trustee, as a result of execution of the Contract [of sale of the Miami Center] in the manner set forth in the above-quoted provisions or any other provision of the plan." Plainly, this language was for the purpose of holding the Trustee harmless from all of the effects of consummation of the plan, including any tax consequences. At trial, the Trustee testified he intended the language to be as broad as necessary to include all potential claims.

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[2] The Debtors complain that the Trustee wrongfully permitted the bank to receive credit of $27 million for post-petition interest. Their prior challenge to this credit failed. *See In re Holywell*, No. 88-151 slip op. (S.D. Fla. July 21, 1988).

After the sale, the debtors and their accountant repeatedly advised the Trustee in writing that the debtors were responsible for any taxes that might be owed. The Trustee's former counsel also advised the Trustee that the Trust had no tax responsibility.

By mid-1987, however, the debtors asserted that the Trust was responsible for the payment of federal taxes. The Internal Revenue Service also began to inquire about tax returns. In order to determine his responsibilities, the Trustee filed the instant adversary proceeding against the United States, the debtors and the bank for declaratory relief of the question of the Trust's tax liability and a determination of the bank's responsibility for any taxes the Trust might owe. This court ruled the Trust had no tax obligations and, therefore, did not reach the Trustee's claims against the bank. *Smith v. United States,* 85 B.R. 898 (Bankr. S.D. Fla. 1988). The district court affirmed, as did the court of appeals. *United States v. Smith,* No. 88-0795 slip op. (S.D. Fla. July 30, 1989), *aff'd,* 911 F.2d 1539 (11th Cir. 1990). The Supreme Court of the United States, however, reversed. *Holywell v. Smith,* 502 [sic] S.Ct. 1021 (1992). The Supreme Court held the Trustee had to file tax returns and pay the tax consequences of the confirmed plan, pursuant to the requirements of § 6012(b)(3) and (4) of the Internal Revenue Code, despite the failure of the plan to provide for income taxes.

There was no determination in that proceeding of the personal liability of the Trustee for the taxes or the bank's liability. The opinion addressed only Mr. Smith's responsibilities as Trustee of the Miami Center Liquidating Trust. *Id.*

Upon remand, the Trustee amended his adversary complaint to pursue claims against the bank and to determine the amount and priority of taxes due the United States. Debtors Gould and Holywell filed counterclaims against Mr. Smith, both individually and as Trustee, for breach of fiduciary duties owed the debtors, for gross negligence, and for conspiracy to injure another in a trade, practice or profession for having failed to file tax returns and pay the taxes due. These debtors also filed cross-claims against the bank for negligent misrepresentation, fraud in connection with a case under title 11, and conspiracy to injure another in a trade, practice or profession.

These counterclaims and cross-claims are not the first time such allegations have been made against the Trustee, individually and as Trustee, and against the bank. The debtors unsuccessfully sued Mr. Smith and the bank for, *inter alia*, failing to establish reserves for taxes. *In re Holywell*, 93 B.R. 780 (S.D. Fla. 1988). They also caused four of Holywell's subsidiaries to sue Mr. Smith and the bank in Virginia for, *inter alia*, his handling of the tax issues. These cases were each dismissed. *See, e.g., Twin Development Corp. v. Smith*, No. 87-0037C slip op. (W.D. Va. Nov. 15, 1988). And, shortly after the Supreme Court's tax decision, the debtors moved for Mr. Smith's discharge as Trustee for his handling of the tax issues. C.P. 2331. That motion was denied without prejudice, at Mr. Gould' [sic] suggestion. See Sept. 11, 1992 Transcript at pp. 37-38.

The debtors' counterclaims and cross-claims were tried before the court on June 21-22, 1993. Mr. Gould appeared *pro se*, and no counsel appeared for Holywell.

At trial, the Trustee testified that he demanded indemnification from the bank before implementing the plan because he knew there could be "all kinds of ramifications, none of which I could examine or be familiar with or know much about right then and there." He stated that he had "no idea whether there would be tax issues." There was undisputed testimony that the Trustee had no knowledge of the tax consequences of the plan. The Trustee's testimony also established that the debtors and their accountants repeatedly advised the Trustee that the debtors were responsible for the filing of tax returns and the payment of taxes. There was also evidence the Trustee relied upon advice given by his former counsel that the Trust had no tax liability.

There was no credible evidence which showed the Trustee knew or, under the circumstances, should have known that he was responsible for the taxes prior to the Supreme Court's ruling.

The court notes that since the Supreme Court's tax decision, the Trustee has reached a settlement with the federal and state tax authorities for amounts substantially less than the remaining Trust assets. None of the tax authorities have pursued claims for penalties or sought to recover against Mr. Smith individually.[3]

CONCLUSIONS OF LAW

The court concludes that there is no basis for the debtors' claims against the Trustee or the bank.

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[3] The tax authorities include Florida, Virginia and the United States.

I. Claims Against The Trustee

The debtors assert counterclaims of gross negligence, breach of fiduciary duty, and conspiracy to injure another in a trade, practice, addressed in order.

A. Gross Negligence

The debtors failed to prove gross negligence. That term has been defined to mean "the equivalent of slight care," *Cadore v. Karp*, 91 So. 2d 806, 808 (Fla. 1957), or "that course of conduct which a reasonable and prudent person would know would probably and most likely result in injury to person or property." *Clement v. Deeb*, 88 So. 2d 505, 506 (Fla. 1956); *Bridges v. Speer*, 79 So. 2d 679, 682 (Fla. 1955). *See also Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959). The law dictionary definition of gross negligence is the "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting life or property of another." Black's Law Dictionary 931 (5th ed. 1979).

The undisputed facts offered at trial show that the Trustee acted properly. The bank proposed and the court confirmed a plan which failed to address income tax consequences of the plan. The debtors failed to present evidence of the potential tax liabilities of the plan at the confirmation. The Trustee's authority to act had not yet begun. Thereafter, the debtors and their accountants led the Trustee to believe they would file tax returns and pay taxes. Even the Trustee's then counsel advised that the Trust had no tax responsibilities. Upon learning that claims were being asserted that the Trust was responsible for taxes, the Trustee promptly initiated this adversary

proceeding to determine the liability of the Trust. Indeed, three courts considered the question and concluded that the Trustee was not responsible for filing tax returns or paying taxes at issue. Once the Supreme Court held that the Trust did have this obligation, the Trustee promptly amended his adversary complaint to seek a determination of the amount and to impose the obligation to pay the tax upon the bank. In addition, he actively negotiated a compromise with each of the taxing authorities on terms favorable to the Trust and ensured the amounts were within the ability of the Trust to pay. Finally, the Trustee obtained a ruling of this court holding the bank liable for having proposed a plan without regard or provision for the payment of such taxes.[4]

These facts do not amount to "slight care" or to conduct which would "probably" result in injury, or would show a "reckless disregard of a manifest duty." This conduct reflects a high degree of care and a proper and reasonable response to a highly unusual and difficult problem.

Accordingly, judgment is entered in favor of the Trustee on the debtors' claim of gross negligence.

B. Breach of Fiduciary Duty

The debtors have failed to demonstrate any breach of fiduciary duty by the Trustee. In a related proceeding in which the debtors sought damages against the Trustee and the bank for, *inter alia*, the failure to establish

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[4] This ruling is limited to liability. A trial on damages will be set by separate order.

reserves for taxes, the district court held that the Trustee does not owe the debtors ordinary common law fiduciary duties, but only those duties defined by the confirmed plan. *See In re Holywell*, 93 B.R. 780, 783 (S.D. Fla. 1988), *aff'd*, No. 88-6187 (11th Cir. July 7, 1989).[5]

In that case, the district court ruled "the allegations of misconduct refer not to the field left to [the trustee's] discretion, but rather to duties that were required by the Confirmed Plan of Reorganization. The [debtors] assert that the Plan established a minimum standard of care, and that the Trustee was still liable under a common law duty to a higher standard." *In re Holywell*, 93 B.R. at 783 (emphasis deleted). The court rejected that connection, stating:

> This argument overlooks the fact that the [debtors] are not claiming that the Trustee breached his common law duty while acting within the provisions of the Plan, but rather that his actions under the Plan *themselves* breached his common law. *Id.*

As phrased by the court, the issue was not whether the plan relieved the Trustee of his common law duty, but whether those duties required of him by the plan were controlling. *Id.* The court held that the plan bound the debtors,[6] and concluded that the Trustee was relieved of personal liability. *Id.*

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[5] That complaint sounded in negligence and breach of common law fiduciary duties, and sought discharge of the Trustee. *In re Holywell*, 93 B.R. at 782.

[6] *Citing In re Sanders*, 81 B.R. 496, 499 (Bankr. W.D. Ark. 1987); *In re Jartran*, 76 B.R. 123, 125 (Bankr. N.D. Ill. 1987); *In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bankr. E.D. Mich. 1984). *See also* 11 U.S.C. § 1141.

This decision is binding upon the issue of the standard of care required by the Trustee. He is not liable to the debtors on the claim of breach of fiduciary duty because he carried out the obligations imposed by the plan and acted reasonably in meeting the obligation to determine and pay the taxes due as a result of implementation of the bank's plan.

Even assuming that decision is not applicable,[7] the debtors have not shown a breach of any duty the Trustee owed to them. The Trustee owed the debtors the duty to carry out the terms of the plan as provided by 11 U.S.C. § 1142. The debtors do not claim that duty was breached. The Trustee was also obligated to conduct himself in a lawful manner in carrying out the plan. He did that. The Trustee complied with each court order governing the tax issues. Upon the Trust being required to file returns and pay taxes, the Trustee did so. The debtors have not demonstrated that the Trustee's actions constitute a breach of any duty the Trustee owed to them.

C. Conspiracy To Injure The Debtors' Trade, Practice Or Profession

No conspiracy between the Trustee and the bank has been demonstrated. The only evidence of the alleged conspiracy introduced by the debtors is the letter of indemnity between the bank and the Trustee. By itself, it

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[7] The debtors appealed this court's denial of their motion to vacate the decision under F.R.Civ.P. 60(b). *Holywell v. Smith*, No. 93-0942 (S.D. Fla. appeal docketed May 3, 1993).

is not sufficient to prove an agreement to either accomplish an unlawful purpose or accomplish some purpose not in itself unlawful but by unlawful means. *See, e.g., Renpak Inc. v. Oppenheimer,* 104 So. 2d 642 (Fla.Ct.App. 1958).

It is the debtors' view that this agreement was demanded by the Trustee as part of a plot to implement the reorganization and thereby evade his duty to pay taxes with impunity. The unrefuted testimony, however, is that the Trustee demanded an indemnity agreement because, unlike the debtors or the bank, he was in no position to investigate or know the consequences of implementing the plan. He was not a party to any of these proceedings prior to confirmation of the plan. Further, the evidence is clear that under the agreement, the Trustee was to be indemnified for *any* consequence, and not just the payment of taxes.

The court does not believe that the mere existence of the indemnity agreement is proof of the existence of a conspiracy to evade the payment of taxes. Judgment is therefore entered in favor of the Trustee on the debtors' counterclaim for conspiracy to injure another in a trade, practice or profession.

1. Res Judicata And Collateral Estoppel.

This is neither the first nor even the second time the debtors have unsuccessfully sought legal redress based on the Trustee's conduct concerning the tax issues. It appears the issue is how many times and in how many

ways can the debtors challenge the Trustee's handling of these matters.

The Supreme Court's tax decision has not changed the result of the debtors' prior unsuccessful attacks on the Trustee. *See* p. 6 *infra*. The Supreme Court opinion addressed only Mr. Smith's duties to report and pay taxes as Trustee. Although the United States was held not to be a creditor under the plan for certain taxes, and hence was not bound by the plan because the taxes in question were post-confirmation liabilities of the Trust, the debtors are nonetheless bound by the terms of the plan. It provides for subordination of the debtors' claims to all other claims, including those for pre- and post-confirmation taxes. This is true even if the plan ultimately provides the debtors with less than that to which they might otherwise be entitled. *See In re St. Louis Freight Lines, Inc.*, 45 B.R. at 552. One way or another, the taxes have to be paid and this payment comes ahead of any payment to the debtors. The plan's subordination of the debtors' claims was not altered by the Supreme Court.

2. Waiver and Estoppel.

The debtors have waived whatever right they may have had to assert their claims against the Trustee for his conduct in handling the tax issues and they are estopped from further pursuing such claims because of the representations they and their accountants made that the debtors would file the tax returns and pay the taxes due, and because of their failure to timely present evidence of the adverse tax consequences of the plan and to seek its modification in order to avoid or minimize the taxes. *See*

DeShong v. Seaboard Coast Line R. Co., 737 F.2d 1520 (11th Cir. 1984); *In re King Memorial Hosp., Inc.*, 19 B.R. 885 (Bankr. S.D. Fla. 1982). The court finds that the Trustee justifiably relied on this conduct in administering the plan. The debtors are not now entitled to pursue claims against the Trustee for the failure to pay taxes after having misled him to believe they were responsible for doing so.

Unlike the Trustee, the debtors and the bank were certainly in the best possible position to know, investigate and disclose the tax consequences, if any, of the reorganization scheme. The failure of the plan to include provision for the payment of taxes, the lack of any evidence as to tax consequences of the plan, and the debtors' conduct through mid-1987, constitute a clear waiver and estoppel of any right the debtors now claim to hold the Trustee responsible for such taxes.

3. Contributory Negligence.

Additionally, the debtors' conduct renders them contributorily negligent to the extent that they are barred from recovery against the Trustee because they helped create and perpetuate the view that the Trust had no tax obligations arising out of the sale of the Miami Center. The Trustee's conduct once the issue arose was free from fault, as he sought court orders to determine his responsibilities. Contributory negligence limits the right to damages which may be recovered to that portion which is proximately caused by the defendant's negligence. *See Williams v. Arai Hirotaki, Ltd.*, 931 F.2d 755 (11th Cir. 1991). In this case, even assuming that thc debtors can prove

negligence, their right to recovery is eradicated by their own level of fault.

4. Reliance.

The Trustee had the right to rely on the advice of his prior counsel that the Trust was not responsible for the tax consequences of the plan even though that advice has proven to be erroneous. The plan provided the Trustee the right to engage professionals to assist him in carrying out the plan. See Art. V par. 3(o). Even under the debtors' theory that ordinary trust law governs the Trustee, the Trustee had the right to hire professionals for advice. See Fla. Stat. § 737.402(2)(y). It follows that the Trustee had the right to rely on the advice of counsel. *See, e.g., Scalise v. Nat'.* [sic] *Utility Svc.*, 120 F.2d 938 (5th Cir. 1941); *Wohl v. Lewy*, 505 So. 2d 525 (Fla.Ct.App. 1987).

The Trustee also had the right to rely on the decisions of this court, the district court and the Eleventh Circuit that he was not responsible for the taxes. Neither the position taken by the Trustee nor those court decisions were frivolous. There is no recognized legal basis to hold the Trustee personally liable for having taken a position which was sanctioned by court orders.

5. Derived Immunity.

The Trustee is an "arm of the court" and is therefore not liable under the theory of derived judicial immunity for his failure to pay the taxes at issue prior to the Supreme Court's tax decision. Courts have recognized that "judicial immunity not only protects judges against

suits from acts done within their jurisdiction, but also spreads outward to shield public servants, including . . . trustees. . . . " *See In re Jackson*, 105 B.R. 542 (9th Cir. B.A.P. 1989), *quoting Bennett v. Williams*, 87 B.R. 122, 123 (S.D. Cal. 1988). A trustee may protect himself from personal liability by seeking instruction from the court, *Mosser v. Darrow*, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951), which is exactly what Mr. Smith did in this case. Because he did, the Trustee is entitled to derived judicial immunity because he performed an integral part of the judicial process by carrying out the plan and acting pursuant to court orders. *Jackson*, 105 B.R. at 545, *citing Lonneker Farms, Inc. v. Klovucher*, 804 F.2d 1096, 1097 (9th Cir. 1986); *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 19891) [sic]. *See also Gregory v. U.S.*, 942 F.2d 1498, 1500 (10th Cir. 1991).

Neither *King v. U.S.*[8] nor *Nicholas v. U.S.*,[9] both cited by the debtors, is applicable to the facts of this case nor do they change the result. In each of those cases, the United States pursued claims against bankruptcy trustees

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[8] 379 U.S. 329 (1964).

[9] 384 U.S. 678 (1966).

under 31 U.S.C. § 3713[10] in connection with their handling of tax matters.[11]

Initially, it is clear that § 3713 is not applicable to cases under title 11. *See* 31 U.S.C. § 3713(a)(2). In addition, *King* is not applicable because, unlike here, the trustee in that case was aware of the government's proof of claim for taxes and deliberately sought to evade payment by colluding with the debtor and paying other creditors, thereby leaving no funds with which to pay the government's claim. None of that happened in this case.

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[10] 31 U.S.C. § 3713 provides:

(a)(1) A claim of the United States Government shall be paid first when –

(A) a person indebted to the Government is insolvent and –

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankrutpcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 1.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

[11] Notably, the federal government and not a private party sought relief under § 3713. In this case, the United States has waived penalties and claims of personal liability against the Trustee.

In *Nicholas,* the issue was limited to whether the bankruptcy trustee was required to pay penalties imposed by the IRS – there being no question of the Trustee's liability for the underlying taxes. As previously noted, the United States expressly waived any claim for penalties in this case.

The court concludes the Trustee is not liable to the debtors pursuant to the doctrine of derived judicial immunity.

6. The Debtors Are Guilty of Inequitable Conduct.

The debtors have engaged in inequitable conduct which precludes any recovery against the Trustee, either individually or in his capacity as Trustee. The debtors appear before the court with unclean hands. Mr. Gould has been held in contempt and substantial fines have been imposed on him on several occasions for misconduct involving interference with the administration of the trust and conversion of its assets. *See Gould v. Smith,* No. 88-0628 slip op. (S.D. Fla. March 6, 1990); *Gould v. Smith,* No. 89-2629-CIV-MARCUS slip op. (S.D. Fla. August 31, 1993) (Memorandum Opinion and Order of Final Judgment).

In addition, once it became clear that the Trust was responsible for filing tax returns, the debtors interfered with the Trustee's efforts to determine the correct amount of taxes in his negotiations with the IRS.[12] They have

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[12] For example, Mr. Gould filed an IRS Form 870 in an unsuccessful attempt to bind the Trustee to the IRS' initial determination of the amount due on his bankruptcy estate even

objected to each of the tax settlements reached by the Trustee, complaining that the tax authorities should be required to be paid from Mr. Smith's individual assets rather than from the Trust, even though they previously argued to the United States Supreme Court that the taxes had to be paid from Trust assets. In their application filed in the United States Supreme Court to stay the Eleventh Circuit's mandate of its tax decision and to enjoin the disbursement of Trust assets during the appeal,[13] the debtors argued at p. 3: "As we demonstrate below, the statute [referring to 26 U.S.C. § 6012(b)] requires resort to the trust fund." The debtors once again changed their position and now claim that Trust monies should not be used because Mr. Smith is personally liable for the payment of Trust tax obligations. Such inequitable conduct bars the debtors from now seeking recovery from the Trustee.

7. Mootness.

By separate Findings of Fact and Conclusions of Law on the Trustee's claims against the bank in this adversary proceeding, the court has entered a judgment on liability against the bank for negligent misrepresentation and to

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though the Trustee asserted that amount to be zero. The debtors represented to the courts that the tax liabilities for which the Trust was responsible exceeded $35 million, and filed an application for a reward with the IRS. The Trsutee [sic] determined the taxes to be but a fraction of that sum and successfully negotiated with the IRS to reduce the amount to be paid.

[13] This was filed on January 17, 1991 in the United States Supreme Court, Case No. A-546.

enforce the indemnity agreement.[14] As a result, the debtors' claims against the Trustee are mooted because of the bank's liability to the Trustee in connection with the obligation to pay taxes.

II. Claims Against The Bank Of New York

The debtors have also asserted cross-claims against the bank for negligent misrepresentation, fraud in connection with a case under title 11, and conspiracy to injure another in a trade, practice or profession.

A. Negligent Misrepresentation and Fraud

The debtors have failed to prove their claims of negligent misrepresentation and fraud.

To the extent the bank was negligent in its representations in the disclosure statement concerning the feasibility of the plan and by the omission of any tax analysis or provision for payment of taxes in its plan, any damage suffered was by the Trust. The debtors are residual beneficiaries of the Trust, and because the Trust prevailed on liability on its claims against the bank for negligent misrepresentation and to enforce the indemnity agreement in connection with the tax issues, the debtors have not been damaged. The court will determine the amount of any damages owed by the bank to the Trust at a separate trial. The debtors, as beneficiaries of the Trust,

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[14] This ruling was limited to liability; there will be a separate trial on damages.

do not have standing separate from the Trustee to recover from the bank under such circumstances.

As to the debtors' claims of intentional misrepresentation and fraud in connection with a case under title 11, they failed to prove that the representations or omissions were unknown to them, or that they relied in any material respect on these misrepresentations or omissions, or that they suffered damages separate from damages sustained by the Trust as a result of the bank's conduct.

Rather, the evidence showed that the taxes required to be paid by the Trustee are consequences which the debtors anticipated and would have borne had the Miami Center been sold outside the bankruptcy court. Moreover, the tax liability involved was one which would have existed in all events under the debtors' own proposed plans of reorganization.

1. Waiver and Estoppel

Just as was found in connection with their claims against the Trustee, the debtors have waived and are estopped from pursuing their claims against the bank because they claimed for almost two years after the effective date of the plan that it was their duty to file returns and pay the taxes due the IRS. Also, the debtors' failure to present evidence to support modification of the plan when provided with an opportunity to do so before the plan became effective precludes them from pursuing their claims.

Further, at trial, the evidence showed that debtor Gould filed the income tax returns for 1984 through 1986 for his estate and for two of the partnership debtors without the Trustee's approval or consent. Accordingly, the doctrines of waiver and estoppel preclude recovery.

2. Res Judicata

Claims that the bank's confirmed plan and disclosure statement are wrongful as to the debtors are barred by the doctrine of *res judicata*. The debtors appealed the order confirming the plan unsuccessfully to the district court, and the court of appeals held the appeal should have been dismissed as moot; the Supreme Court denied review. They are thus precluded from further attacks on the plan.

B. Conspiracy To Injure Another In A Trade, Practice, Profession

The debtors failed to present any evidence at trial of a conspiracy by the bank or any of its representatives to injure the debtors' trade, practice, profession or business. *See* subsection I, c, *infra*. There could be no injury by the bank to the debtors' trade, practice or profession after their bankruptcy discharge. Any claim for injury prior to discharge would, under the confirmed plan and Bankruptcy Code § 541(a), be a chose in action belonging to the Miami Center Liquidating Trust and not to the debtors.

III. Holywell's Failure to Appear At Trial

In addition to all of the reasons why the cross-claims and the counterclaims filed by Holywell Corporation are properly dismissed, these claims are dismissed because the company failed to appear at trial. No attorney appeared for Holywell at the trial. It is well established that a corporation may not appear through its officers, directors or agents and must engage counsel to represent its interests in legal proceedings. *See National Independent Theater Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985); *James v. Daley & Lewis*, 406 F. Supp. 645 (D.Del. 1976); *MacNeil v. Hearst Corp.*, 160 F. Supp. 157 (D.Del. 1958). Along with all of the reasons set forth in sections I and II, the failure of counsel of record or any other attorney to appear on behalf of Holywell at the duly scheduled trial warrants entry of judgment in favor of the Trustee and the bank on all of Holywell's counterclaims and cross-claims, respectively.

It is therefore

ORDERED AND ADJUDGED that judgment is entered in favor of the Trustee on debtors Gould and Holywell's counterclaims, and in favor of The Bank of New York on debtors Gould and Holywell's cross-claims.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 30 day of September, 1993.

/s/
SIDNEY M. WEAVER
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT

Conformed copies provided to Herbert Stettin for distribution to all counsel of record and interested parties.

APPENDIX E

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF FLORIDA

Case No. 94-0111-CIV-
ARONOVITZ
BKC Nos. 84-01590-BKC-PCH
84-01591-BKC-PCH
84-01592-BKC-PCH
84-01593-BKC-PCH
84-01594-BKC-PCH
Adversary No. 87-0627-BKC-
PCH-A

IN RE: HOLYWELL
CORPORATION, *et al.*

Debtors.

_____/

HOLYWELL CORPORATION
and THEODORE B. GOULD,

Appellants,

vs.

THE BANK OF NEW YORK, and
FRED STANTON SMITH, Individually and as Trustee of the
MIAMI CENTER LIQUIDATING
TRUST,

Appellees.

_____/

FINAL ORDER AFFIRMING BANKRUPTCY COURT'S ORDERS

BEFORE THIS COURT is Holywell Corporation and subsidiaries, and Theodore B. Gould ("Debtors") appeal from the following Orders entered by the Bankruptcy Court:

1. United States Bankruptcy Judge Sidney M. Weaver's Order Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer and to Join Additional Parties, dated June 28, 1993;

2. Judge Weaver's Order Denying Defendant Theodore B. Gould's Motion for Separate Trial, dated June 28, 1993;[1]

3. Judge Weaver's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee

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[1] The Bankruptcy Court docket shows that on June 17, 1993 Debtor Gould filed: (1) a Motion for Leave to Amend Answer in Order to Supplement Counterclaims and Cross-claims, and (2) a Motion to Join Additional Parties as Plaintiffs/Defendants. On June 21, 1993, Debtors Gould and Holywell Corporation filed a Motion for Separate Trial. In its Order denying the Motion to Amend and to Join Additional Parties, the Bankruptcy Court misidentifies *Holywell Corporation* as filing with Mr. Gould the Motion for Leave to Amend and Motion to Join Additional Parties. In its Order denying the Motion for Separate Trial, the Bankruptcy Court does not include *Holywell Corporation* as the movant who together with Mr. Gould filed the Motion for Separate Trial. These errors in identifying the particular moving parties are not considered to materially affect this appeal because Debtors Gould and Holywell Corporation are collectively appealing said two Orders entered by the Bankruptcy Court.

from Use of Trust Funds to Pay Taxes, Etc., dated August 27, 1993;

4. Judge Weaver's Final Judgment on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993;[2] and

5. United States Bankruptcy Judge Paul G. Hyman's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, dated November 9, 1993.

This Court heard oral argument on this appeal on September 12, 1994, and has carefully considered all briefs submitted on appeal, oral argument of counsel, the entire record, the applicable law and is otherwise fully advised in the premises. For the following reasons, it is **ORDERED AND ADJUDGED** that:

1. United States Bankruptcy Judge Sidney M. Weaver's Order Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer and to Join Additional Parties, dated June 28, 1993, is hereby **AFFIRMED in its entirety;**

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[2] It should be noted that the Bank of New York also filed a Notice of Appeal as to the September 30, 1993 Final Judgment, as well as a November 9, 1993 Order Denying the Bank of New York's Motion for Rehearing Clarification or Amendment of Findings and Conclusions on Trustee's Claims, Counterclaims, and Cross-claims. This appeal was designated as Case No. 93-2546-CIV-ARONOVITZ and dismissed by this Court by Order Dismissing Bankruptcy Appeal file dated February 9, 1994.

2. Judge Weaver's Order Denying Defendant Theodore B. Gould's Motion for Separate Trial, dated June 28, 1993, is hereby **AFFIRMED in its entirety;**

3. Judge Weaver's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from Use of Trust Funds to Pay Taxes, Etc., dated August 27, 1993, is hereby **AFFIRMED in its entirety;**

4. Judge Weaver's Final Judgment on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993, is hereby **AFFIRMED in its entirety;** and

5. United States Bankruptcy Judge Paul G. Hyman's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, dated November 9, 1993, is hereby **AFFIRMED in its entirety.**

Factual and Procedural Background

Miami Center Limited Partnership borrowed money from the Bank of New York ("Bank") to develop the Miami Center, a hotel and office building complex located in downtown Miami. In August 1984, after it defaulted on the loan, Miami Center Limited Partnership and four affiliated debtors, Theodore B. Gould, Holywell Corporation, Chopin Associates and Miami Center Corporation each filed Chapter 11 petitions. The Bankruptcy Court

confirmed the Bank's plan in August 1985.[3] Fred Stanton Smith was appointed Trustee shortly after confirmation. ("Trustee")

The plan did not contain a specific provision for the payment of federal income taxes. On October 10, 1985, the effective date of the plan, the Trustee sold the Miami Center to the Bank's nominee for $255.6 million. The purchase price was satisfied by cancellation of the Bank's $242 million mortgage lien, and payment of the balance in cash.

After the sale of the Miami Center, Debtors and their accountant advised the Trustee in writing that the Debtors were responsible for any taxes that might be owed. In mid 1987, the Debtors however changed their position and claimed that the Trustee was responsible for the tax consequences of the plan. In late 1987, the Trustee filed an adversary proceeding seeking declaration of the tax obligations of the Trust and, if payment was required, a determination of the Bank's responsibility for these sums.

The Bankruptcy Court, the District Court, and the Court of Appeals all ruled that the Trust had no tax liability. *In re Holywell Corp.*, 85 B.R. 898 (Bankr. S.D. Fla. 1988), *affirmed*, No. 88-0795 slip op. (S.D. Fla. July 30,

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[3] In March 1986, this Court affirmed the Bankruptcy Court's Order confirming the Bank of New York's Plan of Reorganization. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), *appeal dismissed*, 820 F.2d 376 (11th Cir. 1987), *rehearing denied*, 826 F.2d 1010 (11th Cir. 1987), 838 F.2d 1547 (11th Cir. 1988); *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

1989), *affirmed*, 911 F.2d 1539 (11th Cir. 1990). The U.S. Supreme Court, however, *reversed* and held that the Trustee was required to file tax returns and to pay the tax due as a result of consummation of the plan, pursuant to 26 U.S.C. § 6012(b)(3, 4). *Holywell Corp. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992). The Supreme Court further held that United State's [sic] failure to object to confirmation of the plan, which said nothing about filing returns or paying taxes, did not preclude the United States from seeking the payment of taxes from the Trustee.

On remand from the Supreme Court, the Trustee filed an amended adversary complaint to pursue claims against the Bank and to determine the amount and priority of tax obligations.[4] Debtors filed counterclaims against Trustee, both individually and as Trustee for breach of fiduciary duty, gross negligence, and conspiracy to injure another in a trade, practice or profession. Debtors also filed cross-claims against the Bank for negligent misrepresentation, fraud in connection with a case under Title 11, and conspiracy to injure another in a trade, practice or profession.

The Trustee's amended complaint and Debtors' counterclaims and cross-claims were set for trial on June 21, 1993. Four days before trial, on June 17, 1993, Debtor Gould filed two motions including: (1) a Motion for Leave to Amend Answer in Order to Supplement its

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[4] The Bankruptcy Court found the Bank liable to the Trustee under theories of negligence and indemnity. *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993). The Trustee's claims were set for a separate trial on damages.

Counterclaims and Cross-claims (Debtor sought to add counts for alleged RICO violations), and (2) a Motion to join Additional Parties as Plaintiffs/Defendants. On the day of trial, Debtors filed a Motion for a Separate Trial. All three motions were heard the day of trial and denied by the Bankruptcy Court. On June 28, 1993, the Bankruptcy Court entered two Orders denying the three motions. Debtors appeal this ruling.

On the eve of trial, Trustee and United States reached a settlement of the taxes and the Bankruptcy Court later approved that settlement on September 30, 1993. The case proceeded to trial only on Trustee's claims against the Bank (liability only) and on Debtors' counterclaims and cross-claims. On September 30, 1993, the Bankruptcy Court ruled in favor of the Trustee and the Bank on Debtors' counterclaims and cross-claims. Debtors appeal this September 30th Final Judgment.

On June 22, 1993 (the last day of trial) the Bankruptcy Court entered an Order Denying Debtor Gould's Motion to Enjoin Trustee from use of Trust Funds to Pay Taxes. Debtors moved for a rehearing of this June 22, 1993 Order and the Bankruptcy Court denied Debtors' Motion for Rehearing on August 27, 1993. Debtors appeal this August 27th denial of rehearing.

After the Bankruptcy Court approved the settlement between Trustee and United States by Order dated September 30, 1993, Debtor Gould filed a Motion for Rehearing of this Order. On November 9, 1993, the Bankruptcy Court denied this Motion for Rehearing. Debtors appeal this November 9th denial of rehearing.

Standard of Review

In accordance with Federal Rule of Bankruptcy Procedure 8013, the Bankruptcy Court's findings of fact will not be set aside unless clearly erroneous. *In re Chase & Sanborn Corp.*, 904 F.2d 588 (11th Cir. 1990); *In re T&B General Contracting, Inc.*, 833 F.2d 1455 (11th Cir. 1987). Equitable determinations by the Bankruptcy Court are subject to review under an abuse of discretion standard. *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 833 (11th Cir. 1990). Conclusions of law are subject to *de novo* review. *In re Chase & Sanborn Corp.*, 904 F.2d at 593; *In re Sublett*, 895 F.2d 1381 (11th Cir. 1990).

While the Bankruptcy Court's factual findings are subject to a clearly erroneous standard, that standard does not apply when determining the propriety of the Bankruptcy Judge's conclusions of law, (i.e.) determination of what law applies or determination of the ultimate legal conclusions resulting from the application of the law to the facts. Legal conclusions made by the Bankruptcy Judge may not be approved by the District Court without an independent determination. *In re Columbia Data Products, Inc.*, 99 B.R. 682, 684 (D.Md. 1989), *affirmed*, 892 F.2d 26 (4th Cir. 1989); *citing, In re Hunter Sav. Ass'n.*, 34 B.R. 368, 374 (Bankr.S.D. Ohio 1983), *reversed on other grounds*, 750 F.2d 536 (6th Cir. 1984); *In re Hollock*, 1 B.R. 212, 215 (Bankr.M.D. Pa. 1979).

Appellant Debtors' Arguments on Appeal

Debtors argue that the Bankruptcy Court lacked subject matter jurisdiction to enter the September 30, 1993 Final Judgment denying Debtors' counterclaims against

Trustee and denying Debtors' cross-claims against the Bank. Debtors contend that the counterclaims (alleging negligence, conspiracy and breach of fiduciary duty) are not core matters that are referable to the Bankruptcy Judge without consent.

Debtors argue that the Bankruptcy Court abused its discretion when it denied Debtor Gould's Motion for Leave to Amend its Answer to add counts alleging racketeering. Debtors contend that evidence discovered during depositions warranted amendment of their counterclaims and cross-claims.

Debtors argue that the Bankruptcy Court abused its discretion by denying Debtors' Motion for Separate Trial and by denying Debtor Gould's Motion to Join Additional Parties. Debtors argue that the denial to join additional parties violated Rule 19, Fed.R.Civ.P. which provides for joinder of persons needed for just adjudication. Moreover, Debtors argue that the Order denying joinder of the Bank's attorneys as cross-defendants and Trustee's accountants as counterdefendants, as well as the denial of the motion for separate trial precluded a fair trial on the issues.

Debtors claim that Judge Weaver's September 30th Final Judgment is not in conformity with the Supreme Court's decision in *Holywell Corp. v. Smith, supra.* Moreover, Debtors argue that the Bankruptcy Court erred in denying the Motion to Enjoin Trustee from using the Trust's funds to pay the taxes. Debtors argue that the Trust's funds used to pay the corporate income taxes attributable [to] Holywell Corporation and Miami Center Corporation were assets of Gould's individual estate and

that the property of one's estate cannot be used to pay taxes assessed against another taxpayer. Debtors argue that Trustee is personally liable for the taxes under 31 U.S.C. § 3713(b).[5] Finally, Debtors claim that the Bankruptcy Court abused its discretion in denying Debtors' Motion to Modify the Settlement between Trustee and United States.

In summary, Appellee Debtors argue that all Orders on appeal to this Court and described herein should be reversed.

Appellee Trustee's Arguments on Appeal

In rebuttal, Appellee Trustee argues that it is beyond dispute that the Bankruptcy Court had jurisdiction over the amended complaint and Debtors' counterclaims and cross-claims. Trustee asserts that on remand from the Supreme Court, the amended complaint sought declaratory relief against the federal government in order to determine the priority and amount of the Trust's tax obligations imposed by the Supreme Court. Debtors were named in the amended complaint as interested parties and no affirmative relief was sought against them.

Trustee argues that Debtors voluntarily submitted to the jurisdiction of the court by filing counterclaims

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[5] 31 U.S.C. § 3713(b) provides:
A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims to the Government.

against the Trustee and cross-claims against the Bank. Trustee contends that Debtors were not legally compelled to assert their claims as the counterclaims were not compulsory under Rule 13(a), Fed.R.Civ.P.

Trustee further argues that Debtors have waived any right to contest jurisdiction because Debtors specifically admitted in their answer and counterclaim that the Court had jurisdiction.[6] Moreover, the confirmed plan grants the Bankruptcy Court jurisdiction post-confirmation to enter any order necessary or appropriate for the administration of proceedings.

Trustee argues that the Bankruptcy Court properly denied (1) Debtor's Motion to Amend the Counterclaims and Cross-claims, (b) Debtor's Motion to Join Additional Parties, and (c) Debtors' Motion for Separate Trial, as all three motions were untimely. The Motion to Amend and Motion to Join Additional Parties were filed 4 days before trial and the Motion for Separate trial was filed on the day of trial. Trustee asserts that these motions would have dramatically affected the scheduled trial. Trustee argues that the Motion for Separate Trial was essentially a motion for continuance and the Bankruptcy Court properly denied all three motions.

Trustee argues that the Bankruptcy Court did not err in its September 30, 1993 Findings of Fact and Conclusions of Law. In particular. Trustee argues that Debtors

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[6] Debtors admitted in their answer at par.1 that the "Court does have postconfirmation jurisdiction to exercise supervisory control over the Trustee as an officer of this Court." Debtors also alleged in their counterclaim at par.57 that the Bankruptcy Court had the requisite jurisdiction. Court Paper #66.

failed to prove gross negligence, breach of fiduciary duty and conspiracy. Also, the Bankruptcy Court found that the issues in Debtors' counterclaims and cross-claims had been raised before and that the doctrines of *res judicata* and collateral estoppel bar relitigation.

Trustee argues that the Motion to Enjoin the Use of Trust Monies to Pay Taxes was properly denied by the Bankruptcy Court. Trustee claims that Debtors are estopped from arguing that the assets of the Trust are not available to pay the tax obligations because Debtors argued to the Supreme Court in their Application to Stay Mandate of the Eleventh Circuit's tax decision that: "As we demonstrate below, the statute [26 U.S.C. § 6012(b)] requires resort to the trust fund."

Moreover, Trustee argues the Supreme Court's decision was limited to the Trustee's obligation to file returns and pay taxes. It did not hold the Trustee personally liable for the taxes and 31 U.S.C. § 3713 does not apply to impose such liability in this case. Trustee notes that 31 U.S.C. § 3713(a)(2) expressly states that it is not applicable to "a case under title 11." Lastly, Trustee argues that there is no evidence that the funds remaining in the Trust are traceable to Gould's bankruptcy estate, as opposed to the estates of his co-debtors.

Appellee Bank's Arguments on Appeal

Appellee Bank's arguments are in accord with Trustee's arguments. Bank adds that the Bankruptcy Court clearly has subject matter jurisdiction because 11 U.S.C. § 505(a) expressly permits a bankruptcy court to "determine the amount or legality of any tax, any fine or

penalty relating to a tax, or any addition to tax, whether or not previously assessed. . . . " Bank further argues that 28 U.S.C. § 157(b)(2)(A) provides that "matters concerning the administration of the estate" are "core" bankruptcy matters and § 157(b)(2)(O) characterizes a proceeding "affecting the liquidation of the assets of the estate" as a "core" matter. Bank contends that the Bankruptcy Court accordingly had subject matter jurisdiction over Trustee's adversary proceeding.

Bank argues that the Bankruptcy Court's September 30, 1993 Judgment, Findings and Conclusions are correct and are based upon duly-admitted evidence and applicable case law. Bank claims that Debtors have not shown the Court's findings to be clearly erroneous. Bank argues that the Bankruptcy Court properly denied Gould's Motion to Enjoin Trustee from using Trust Funds to pay the taxes. The Trustee, the United States and the Bank all opposed Gould's motion for injunction. Bank argues that in his motion and at hearing, Gould did not prove any of the essential elements for injunctive relief and the Bankruptcy Court properly denied the motion.

Finally, Bank argues that after devoting two evidentiary hearings to the IRS settlement, the settlement was properly approved by the Bankruptcy Court. Bank states that there was no abuse of discretion by the Bankruptcy Court in approving the settlement.

United States' Amicus Brief

United States as an interested party in this matter argues that the Bankruptcy Court correctly approved the settlement of federal tax liabilities reached between

Trustee and United States. In the settlement, Trustee paid to the United States $10 million in taxes, in addition to amounts previously paid (approximately $3,327,229).

Since the Supreme Court held that Trustee was responsible for the payment of the tax liabilities, Trustee's payment from the Trust fund was proper as the plan gave Trustee all title, right and interest to the trust property. United States argues that Debtors are estopped from arguing that Trustee cannot use the funds in his possession to pay the taxes since Debtors already argued that Trustee was the only one able to pay the taxes. United States asserts that Debtors' challenge to the tax settlement should be rejected.

In summary, Appellees Trustee and Bank argue that all Orders on appeal to this Court and described herein should be affirmed. Moreover, United States argues that this Court should reject Debtors' challenge to the settlement between the Trustee and United States.

Discussion

Bankruptcy Court's Orders (a) Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer and to Join Additional Parties, and (b) Denying Defendant Theodore B. Gould's Motion for Separate Trial, both Orders dated June 28, 1993.

Upon careful consideration of the arguments made by the parties and a review of the entire record, including all briefs submitted by the parties, Debtors have not

demonstrated to this Court that the Bankruptcy Court abused its discretion or erred as [a] matter of law in denying Debtors' three motions. *Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 39 F.3d 292, 297 (11th Cir. 1994) (the appellate court's standard of review is abuse of discretion as to a district court's denial of a motion to amend a complaint); *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1346 (6th Cir. 1993) (the appellate court reviews a Rule 19(a) finding that a party is necessary to an action under an abuse of discretion standard, whereas a Rule 19(b) determination that a party is indispensable to an action is reviewable *de novo*).

Debtor Gould's Motion for Leave to Amend Answer and Motion to Joint Additional Parties were filed 4 days before trial. Debtors' Motion for Separate trial was filed the day of trial. The Bankruptcy Court asked Mr. Gould at trial "why were the amendments filed so late." (6/21/93 Trial Transcript, p. 20) The Bankruptcy Court, obviously concerned with the timeliness of Debtor's Motions to Amend and to Join Additional Parties, denied them. As to the Motion for Separate Trial, the Court denied it without comment. (6/21/93 Trial Transcript, p. 22)

Bankruptcy Rule 7015 governs amendments in an adversary proceeding. Said rule incorporates Rule 15, Fed.R.Civ.P. which provides that leave to amend "shall be freely given when justice so requires." However, a trial court may deny a motion for leave to amend if permitting an amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990), *citing, Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). This Court

finds no justice in allowing Debtors to add racketeering claims and nine more parties on the eve of trial considering the long established history of this case before the Bankruptcy Court, this Court, other District Courts in the Southern District of Florida, the Eleventh Circuit and the United States Supreme Court. To permit amendment at this late stage would indeed prejudice the opposing parties in this case. Likewise, Debtors have not shown to this Court that the Bankruptcy Court erred in denying Debtors' Motion for Separate Trial.

Bankruptcy Court's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from Use of Trust Funds to Pay Taxes, Etc., dated August 27, 1993.

Debtors have not shown to this Court that the Bankruptcy Court abused its discretion in denying their Motion for Rehearing of the June 22, 1993 Order. *Davis v. Wal-Mart Stores, Inc.*, 967 F.2d 1563, 1566 (11th Cir. 1992) (the standard of review for a district court's disposition of a motion for new trial is abuse of discretion). Moreover, Debtors are estopped from arguing that the tax obligation cannot be paid from the Trust funds because Debtors argued to the Supreme Court in their Application to Stay Mandate of the Eleventh Circuit's tax decision that: "As we demonstrate below, the statute [26 U.S.C. § 6012(b)] requires resort to the trust fund."

This Court finds that the Supreme Court's decision in *Holywell Corp. v. Smith, supra,* does not impose personal

liability on the Trustee to pay the taxes and, as the Bankruptcy Court properly found, 31 U.S.C. § 3713[7] does not apply in this title 11 case. Specifically, the Bankruptcy Court held:

> Initially, it is clear that § 3713 is not applicable to cases under title 11. *See* 31 U.S.C. § 3713(a)(2) . . . . The Court concludes the Trustee is not liable to the debtors pursuant to the doctrine of derived judicial immunity. Final Judgment dated 9/30/93, p. 18.

Therefore, the Bankruptcy Court did not abuse its discretion in denying Debtors' Motion for Rehearing of the June 22, 1993 Order.

Bankruptcy Court's Final Judgment, Findings of Fact and Conclusions of Law on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993

The Bankruptcy Court held a trial on these claims on June 21-22, 1993. On September 30, 1993, the Bankruptcy Court ruled in favor of the Trustee and the Bank on Debtors' counterclaims and cross-claims. This Court finds

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[7] 11 U.S.C. § 3713 governing priority of Government claims provides in relevant part:

(a)(2) **This subsection does not apply to a case under title 11.**

(b) A representative of a person or an estate **(except a trustee acting under title 11)** paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims to the Government. **(emphasis added)**

that the Bankruptcy Court had subject matter jurisdiction over Debtors' counterclaims and cross-claims pursuant to 11 U.S.C. § 505(a), 28 U.S.C. § 157(b)(2)(A) and § 157(b)(2)(O).[8] Also, subject matter jurisdiction is proper due to the original posture of this case and its subsequent remand from the Supreme Court. The salient findings made by Bankruptcy Court with regard to Debtors' counterclaims and cross-claims are set forth below.

As to Debtors' counterclaim of **gross negligence against Trustee**, the Bankruptcy Court found that Trustee's "conduct reflects a high degree of care and a proper and reasonable response to a highly unusual and difficult problem." September 30, 1993, Findings of Fact and Conclusions of Law, p. 10.

As to Debtors' counterclaim of **breach of fiduciary duty against Trustee**, the Bankruptcy Court found that Debtors failed to demonstrate any breach of fiduciary duty, stating that "Trustee complied with each court order governing the tax issues [and] [u]pon the trust being required to file returns and pay taxes, the Trustee did so." September 30, 1993, findings of Fact and Conclusions of Law, p. 12.

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[8] 11 U.S.C. § 505(a) provides in relevant part:
"the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed"
28 U.S.C. § 157(b)(2)(A) provides that "matters concerning the administration of the estate" are "core" bankruptcy matters and § 157(b)(2)(O) characterizes a proceeding affecting the liquidation of the assets of the estate" as a "core" matter.

As to Debtors' counterclaim of **conspiracy against Trustee**, the Bankruptcy Court found that Debtors established no conspiracy between Trustee and the Bank. The Bankruptcy Court found that the only evidence of any alleged conspiracy was an indemnity letter between Trustee and Bank, and that the letter by itself was insufficient to prove any "agreement to either accomplish an unlawful purpose or accomplish some purpose not in itself unlawful but by unlawful means." September 30, 1993, Findings of Fact and Conclusions of Law, p. 12.

The Bankruptcy Court further found that the Debtors were estopped and otherwise waived their right to assert these claims due to their prior conduct in this case. The Court found that the Debtors "engaged in inequitable conduct which precludes any recovery against the Trustee, either individually or in his capacity as Trustee." September 30, 1993, Findings of Fact and Conclusions of Law, p. 18.

As to Debtors' cross-claims of **negligent misrepresentation and fraud against Bank**, the Bankruptcy Court found that Debtors failed to prove such claims. As to Debtors' cross-claim of **conspiracy against Bank**, the Court held that "debtors failed to present any evidence at trial of a conspiracy by the bank or any of its representatives to injure the debtors' trade, practice, profession or business." September 30, 1993, Findings of Fact and Conclusions of Law, p. 23. Finally, the Bankruptcy Court added as an additional reason for dismissing Debtor Holywell's cross-claims and counterclaims was that no attorney appeared for Holywell Corporation at the trial.

Upon careful review of the arguments presented, the entire record and applicable law, Debtors have not shown that the Bankruptcy Court's factual findings are clearly erroneous. Moreover, a *de novo* review of the Court's legal conclusions shows no error with regard to the September 30, 1993 Final Judgment. Said Final Judgment is in conformity with the Supreme Court's decision in *Holywell Corp. v. Smith, supra*. That decision held that the Trustee had to file returns and pay taxes on income attributable to Debtors' property. The Supreme Court never stated that the Trustee was "personally liable" for the tax. Rather, it said that the Trustee had to pay taxes which means the Trustee, in his capacity as Trustee. On remand, a settlement was reached between Trustee and United States to pay those taxes out of the Trust. This is consistent with the confirmed plan which provided that "all costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property." The tax settlement was confirmed by the Bankruptcy Court. The matters which have transpired after remand are consistent with and conform to the Supreme Court's *Holywell* decision. Accordingly, the September 30, 1993 Final Judgment should be **AFFIRMED.**

Bankruptcy Court's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulations and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, dated November 9, 1993

Again, Debtors have not shown that the Bankruptcy Court abused its discretion in denying Gould's Motion

for Rehearing of Order Approving Stipulation. *Davis v. Wal-Mart Stores, Inc., supra.* While Debtors make the statement in their brief that the Bankruptcy Court abused its discretion, Debtors have failed to show how the Bankruptcy Court abused its discretion. Accordingly, the November 9, 1993 should be **AFFIRMED**.

In summary and for the reasons set forth herein, it is **ORDERED AND ADJUDGED** that:

1. United States Bankruptcy Judge Sidney M. Weaver's Order Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer and to Join Additional Parties, dated June 28, 1993, is hereby **AFFIRMED in its entirety;**

2. Judge Weaver's Order Denying Defendant Theodore B. Gould's Motion for Separate Trial, dated June 28, 1993, is hereby **AFFIRMED in its entirety;**

3. Judge Weaver's Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from use of Trust Funds to Pay Taxes, Etc., dated August 27, 1939, is hereby **AFFIRMED in its entirety;**

4. Judge Weaver's Final Judgment on the Debtors' Counterclaims against the Trustee and Cross-claims against the Bank of New York, dated September 30, 1993, is hereby **AFFIRMED in its entirety;** and

5. United States Bankruptcy Judge Paul G. Hyman's Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the

United States of America, dated November 9, 1993, is hereby **AFFIRMED in its entirety.**

DONE AND ORDERED in Chambers at Miami, Florida, this 20[th] day of January, 1995.

/s/
SIDNEY M. ARONOVITZ
UNITED STATES
DISTRICT JUDGE

copies provided:
The Honorable Norman C. Roettger, Chief Judge
The Honorable Sidney M. Weaver
The Honorable Paul G. Hyman
The Honorable Lenore C. Nesbitt
The Honorable Edward B. Davis
The Honorable Stanley Marcus
The Honorable William J. Zloch
Robert M. Musselman, Esq.
Theodore B. Gould, Pro Se
Herbert Stettin, Esq.
Jose F. DeLeon, Esq.
Vance E. Salter, Esq.
Fred Stanton Smith, Trustee
Clerk, U.S. Bankruptcy Court
The Honorable James Lawrence King
The Honorable William M. Hoeveler
The Honorable A. Jay Cristol
The Honorable Robert A. Mark
The Honorable Raymond B. Ray
The Honorable Steven H. Friedman

APPENDIX F

STATUTORY PROVISIONS INVOLVED

1. **28 U.S.C. § 1334. Bankruptcy cases and proceedings.**

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [11 U.S.C. §§ 101 et seq.].

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [11 USCS §§ 101 et seq.], or arising in or related to cases under title 11 [11 USCS §§ 101 et seq.]

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 [11 USCS §§ 101 et seq.], or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.].

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 [11 USCS §§ 101 et seq.] but not arising under title 11 [11 USCS §§ 101 et seq.] or arising in a case under title 11 [11 USCS §§ 101 et seq.], with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an

action is commenced, and can be timely adjudicated in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code [11 USCS § 362], as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 [11 USCS §§ 101 et seq.] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

2. **28 U.S.C. § 157, Procedures,** provides in relevant part:

(a) Each district court may provide that any or all cases under title 11 [11 USCS §§ 101 et seq.] and any or all proceedings arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.] shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases uner title 11 [11 USCS §§ 101 et seq.] and all core proceedings arising under title 11 [11 USCS §§ 101 et seq.], or arising in a case under title 11 [11 USCS §§ 101 et seq.], referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

(2) Core proceedings include, but are not

limited to –

(A) matters concerning the administration of the estate. . . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship. . . .

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11 [11 USCS §§ 101 et seq.]. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code [subsec. (b)(2)(B) of this section], shall not be subject to the mandatory abstention provisions of section 1334(c)(2) [28 USCS § 1334(c)(2)]. . . .

(c)(1)A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11 [11 USCS §§ 101 et seq.]. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 [11 USCS §§ 101 et seq.] to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 [11 USCS §§ 101 et seq.] and other laws of the United States regulating organizations or activities affecting interstate commerce.

3. **11 USCS § 105. Power of court**, provides in relevant part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title [11 USCS §§ 101 et seq.]. . . .

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title [11 USCS §§ 101 et seq.]

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title [11 USCS §§ 101 et seq.] shall be determined by reference to the provisions relating to such judge, officer, or

> employee set forth in title 28 [28 USCS §§ 1 et seq.]. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 [28 USCS §§ 151 et seq.] from its operation.

4. **11 USCS § 505. Determination of tax liability,** provides, in relevant part:

> (a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.
>
> (2) The court may not so determine –
> (A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title . . . .
>
> (b) A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax. Unless such return is fraudulent, or contains a material misrepresentation, the trustee, the debtor, and any successor to the debtor are discharged from any liability for such tax. . . .

(c) Notwithstanding section 362 of this title, after determination by the court of a tax under this section, the governmental unit charged with responsibility for collection of such tax may assess such tax against the estate, the debtor, or a successor to the debtor, as the case may be, subject to any otherwise applicable law.

5. **26 U.S.C. § 6901, Transferred assets,** provides, in relevant part:

(a) *Method of collection.* –

The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner, and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate, and gift taxes.

(A) Transferees. The liability, at law or in equity, of a transferee of property –

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes), or

(iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes), in respect of the tax imposed by subtitle A or B.

(B) Fiduciaries. The liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of the payment of any tax described in subparagraph (A) from the estate

of the taxpayer, the decedent, or the donor, as the case may be.

(2) Other taxes. The liability, at law or in equity of a transferee of property of any person liable in respect of any tax imposed by this title (other than a tax imposed by subtitle A or B), but only if such liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a).

6. **26 U.S.C. § 7421, Prohibition of suits to restrain assessment or collection**, provides, in relevant part:

(b) Liability of transferee or fiduciary – No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of –

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of any such tax.

7. **28 U.S.C. § 2201. Creation of remedy**, provides, in relevant part:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under sections 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering

authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

8. **26 U.S.C. § 1398. Rules relating to individuals' title 11 cases,** provides, in relevant part:

(a) Cases to which section applies. Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of title 11 of the United States Code in which the debtor is an individual.

(b) Exceptions where case is dismissed, etc.

(1) Section does not apply where case is dismissed. This section shall not apply if the case under Chapter 7 or 11 of title 11 of the United States Code is dismissed.

(2) Section does not apply at partnership level. For purposes of subsection (a), a partnership shall not be treated as an individual, but the interest in a partnership of a debtor who is an individual shall be taken into account under this section in the same manner as any other interest of the debtor.

. . .

(f) Treatment of transfers between debtor and estate.

(1) Transfer to estate not treated as disposition. A transfer (other than by sale or exchange) or an asset from the debtor to the estate shall not be treated as a disposition for purposes of any provision of this

title assigning tax consequences to a disposition, and the estate shall be treated as the debtor would be treated with respect to such asset.

(2) Transfer from estate to debtor not treated as disposition. In the case of a termination of the estate, a transfer (other than by sale or exchange) of an asset from the estate to the debtor shall not be treated as a disposition for purposes of any provision of this title assigning tax consequences to a disposition, and the debtor shall be treated as the estate would be treated with respect to such asset.

(g) Estate succeeds to tax attributes of debtor. The estate shall succeed to and take into account the following items (determined as of the first day of the debtor's taxable year in which the case commences) of the debtor –

(1) Net operating loss carryovers. The net operating loss carryovers determined under section 172.

(2) Charitable contributions carryovers. The carryover of excess charitable contributions determined under section 170(d)(1).

(3) Recovery of tax benefit items. Any amount to which section 111 (relating to recovery of tax benefit items) applies.

(4) Credit carryovers, etc. The carryovers of any credit, and all other items which, but for the commencement of the case, would be required to be taken into account by the debtor with respect to any credit.

(5) Capital loss carryovers. The capital loss carryover determined under section 1212.

(6) Basis, holding period, and character of assets. In the case of any asset acquired (other than by sale or exchange) by the estate from the debtor, the basis, holding period, and character it had in the hands of the debtor.

(7) Method of accounting. The method of accounting used by the debtor.

(8) Other attributes. Other tax attributes of the debtor, to the extent provided in regulations prescribed by the Secretary as necessary or appropriate to carry out the purposes of this section.

(h) Administration, liquidation, and reorganization, expenses; carryovers and carrybacks of certain excess expenses.

(1) Administration, liquidation, and reorganization expenses. Any administrative expense allowed under section 503 of title 11 of the United States Code, and any fee or charge assessed against the estate under chapter 123 of title 28 of the United States Code, to the extent not disallowed under any other provision of this title, shall be allowed as a deduction.

(2) Carryback and carryover of excess administrative costs, etc., to estate taxable years.

(A) Deduction allowed. There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (i) the administrative expense carryovers to such year, plus (ii) the administrative expense carrybacks to such year.

(B) Administrative expense loss, etc. If a net operating loss would be created

or increased for any estate taxable year if section 172(c) were applied without the modification contained in paragraph (4) of section 172(d), then the amount of the net operating loss so created (or the amount of the increase in the net operating loss) shall be an administrative expense loss for such taxable year which shall be an administrative expense carryback to each of the 3 preceding taxable years and an administrative expense carryover to each of the 7 succeeding taxable years.

(C) Determination of amount carried to each taxable year. The portion of any administrative expense loss which may be carried to any other taxable year shall be determined under section 172(b)(2), except that for each taxable year the computation under section 172(b)(2) with respect to the net operating loss shall be made before the computation under this paragraph.

(D) Administrative expense deductions allowed only to estate. The deductions allowable under this chapter solely by reason of paragraph (1), and the deduction provided by subparagraph (A) of this paragraph, shall be allowable only to the estate.

(i) Debtor succeeds to tax attributes of estate. In the case of a termination of an estate, the debtor shall succeed to and take into account the items referred to in paragraphs (1), (2), (3), (4), (5), and (6) of subsection (g) in a manner similar to that provided in such paragraphs (but taking into account that the transfer is from the estate

> to the debtor instead of from the debtor to the estate). In addition, the debtor shall succeed to and take into account the other tax attributes of the estate, to the extent provided in regulations prescribed by the Secretary as necessary or appropriate to carry out the purposes of this section.

9. **26 U.S.C. § 1339. No separate taxable entities for partnerships, corporations, etc.,** provides:

> Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code.